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# The History of Misdemeanor Bail

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## THE HISTORY OF MISDEMEANOR BAIL

SHIMA BARADARAN BAUGHMAN\*

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*Bail is one of the most consequential decisions in criminal justice. The ability to secure bail often makes the difference between guilt and innocence, retaining employment and family obligations, and keeping a place to live. These implications affect those charged with felonies and this has been the focus for many years, but it affects even more so those charged with misdemeanors. A misdemeanor is theoretically a less serious crime with less serious consequences, but the effects on a defendant's life are just as serious in the short term. There is a growing body of important empirical work that demonstrates the impact of being denied bail on those charged with misdemeanors. However, there is a lack of theoretical scholarship explaining defendants' rights when it comes to misdemeanor bail. There is also a lack of historical perspective in determining how we have dealt with misdemeanor crimes. Considering this historical perspective, we learn that misdemeanors have always been plentiful but it is only recently that they have become a serious problem and that their impact has become as serious as felony offenses. This Article strives to provide*

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\* Professor of Law, University of Utah, S.J. Quinney College of Law. Special thanks to the participants of the *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System* conference at the Boston University School of Law for their insightful comments and for engaging with me on this topic, including Julian Adler, Judge Stephanos Bibas, Jenn Rolnick Borchetta, Robert Boruchowitz, Judge David Breen, Jeffrey Fagan, Malcolm Feeley, Sarah Geraghty, Samuel Gross, Eisha Jain, Irene Joe, Wendy Kaplan, George Kelling, Issa Kohler-Hausman, Gerry Leonard, Karen Pita Loor, Sandra Mayson, Alexandra Natapoff, Jenny Roberts, David Rossman, Judge Shira Scheindlin, Megan Stevenson, Susan Terrey, and Judge Michael Vitali. I am grateful for the assistance of Madeline Aller, Melissa Bernstein, Amylia Brown, Tyler Hubbard, Ross McPhail, Emily Mabey Swensen, Angela Turnbow, and Kristin Wilson for research and editing assistance on this Article.

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*a first step toward creating a theoretical footing for misdemeanor bail decisions by considering the historical role of misdemeanors and discussing the importance of creating an analytical framework for making these decisions.*

#### INTRODUCTION

Perchelle Richardson does not even know why she took the iPhone from her neighbor's car—it was an impulsive move that cost her two months of jail time and missed school.<sup>1</sup> The New Orleans teen had no previous criminal record and her mom had given her a basic cell phone a few days earlier for her eighteenth birthday.<sup>2</sup> But she liked the way iPhones looked and there one was, sitting on the arm rest in an unlocked car.<sup>3</sup> Richardson took the phone and was arrested.<sup>4</sup> The judge issued a \$5000 personal surety, assuming Richardson would be released the next morning.<sup>5</sup> But because her family could not absorb the \$2000 administrative fee, Richardson spent fifty-one days behind bars.<sup>6</sup> Already behind in her studies due to Hurricane Katrina, Richardson fell further behind in school, with nothing to study but the class worksheets delivered by her public defender.<sup>7</sup> Because Richardson was the primary childcare provider for her family, alternate living arrangements had to be made for the other children.<sup>8</sup> Her public defender attempted to get her released without paying the fee but had no luck with the judge.<sup>9</sup> Eventually, Richardson's aunt pulled together the money to free her two weeks before her scheduled arraignment.<sup>10</sup> Like many other low-income defendants, Richardson spent more time waiting in jail to visit a judge than she received in the sentence for her charge: the prosecutor eventually dropped the burglary charge against her.<sup>11</sup> She probably expected to return home later the night of the arrest; if she had not been an indigent defendant, she might have.<sup>12</sup> Almost two months in jail and these other major consequences all came about due to a misdemeanor.

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<sup>1</sup> Katy Reckdahl, *Jailed Without Conviction: Behind Bars for Lack of Money*, CHRISTIAN SCI. MONITOR (Dec. 16, 2012), <https://www.csmonitor.com/USA/Justice/2012/1216/Jailed-without-conviction-Behind-bars-for-lack-of-money> [<https://perma.cc/9P57-7GBJ>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 8 (2018).

<sup>6</sup> *Id.*

<sup>7</sup> Reckdahl, *supra* note 1. Richardson also suffered physical ailments, including stomach problems (likely due to food she was provided while incarcerated) and bug bites that covered her body. *Id.*

<sup>8</sup> BAUGHMAN, *supra* note 5, at 8.

<sup>9</sup> Reckdahl, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> BAUGHMAN, *supra* note 5, at 8.

<sup>12</sup> *Id.*

Richardson is not alone in her experience. In Dallas, a grandmother spent two months in jail on \$150,000 bail after being accused of shoplifting \$105 worth of school clothes for her grandkids.<sup>13</sup> A former National Guardsman who was unemployed, pregnant, and homeless, Kandace Edwards, allegedly forged a \$75 check.<sup>14</sup> She was given a \$7500 bail that she could not pay and went to jail in Alabama.<sup>15</sup> Seventy-year-old Betty Perry, who had never been in trouble with the law, was taken to jail for violating a city ordinance that required that she water her lawn.<sup>16</sup> When an officer attempted to give her a ticket for this violation, she refused to take it since she could not afford to water her lawn.<sup>17</sup> The officer then dragged her down her front steps straight to the local jail.<sup>18</sup> Perry sustained injuries to her nose and elbows and left a trail of blood down her steps and on her door.<sup>19</sup> She was completely frightened by being thrown in jail as she had never encountered anything like it.<sup>20</sup> Eventually the charge was dismissed, but the damage was done.<sup>21</sup> Perry is now frightened of the police and warns: “Don’t ever say no when the police tell you do to [sic] something. . . . You’ve got to do what they tell you or they will hurt you.”<sup>22</sup> This pain and trauma all occurred over a misdemeanor.

Perry and Richardson’s accounts provide some insight into the problem of misdemeanors in America. We do not know very much about misdemeanors

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<sup>13</sup> Cary Aspinwall, *Why Dallas County Can Set \$150,000 Bail for a \$105 Shoplifting Charge—and How Taxpayers Lose*, DALLAS NEWS (Dec. 2016), <https://www.dallasnews.com/news/social-justice-1/2016/12/29/dallas-county-demands-150000-bail-105-shoplifting-charge-taxpayers-lose> [<https://perma.cc/JN6X-9R6W>] (discussing how Dallas’s use of large bail amounts is both waste of taxpayer dollars and is particularly burdensome for poor offenders).

<sup>14</sup> Anna Clair Vollers, *Too Poor to Make Bail: Alabama Forced to Reform ‘Two-tiered’ Jail System*, AL.COM (Oct. 11, 2017), [http://www.al.com/news/index.ssf/2017/10/too\\_poor\\_to\\_make\\_bail\\_alabama.html](http://www.al.com/news/index.ssf/2017/10/too_poor_to_make_bail_alabama.html) [<https://perma.cc/TLD9-TUEY>] (describing how Alabama’s bail system often results in defendants charged with minor offenses spending months in jail because they are unable to make bail pending trial).

<sup>15</sup> *Id.*

<sup>16</sup> Sam Penrod, *Woman Arrested for Not Watering Lawn*, KSL.com (July 6, 2007, 10:00 PM), <https://www.ksl.com/?nid=148&sid=1444771> [<https://perma.cc/GR6Q-FBQT>].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Jeremy Duda, *Orem Eyes Changes to Landscaping Ordinance*, DAILY HERALD (Feb. 12, 2008), [http://www.heraldextra.com/news/local/oreem-eyes-changes-to-landscaping-ordinance/article\\_25187a40-1829-5cf5-a329-a97b4bea597c.html](http://www.heraldextra.com/news/local/oreem-eyes-changes-to-landscaping-ordinance/article_25187a40-1829-5cf5-a329-a97b4bea597c.html) [<https://perma.cc/9EP8-XR2G>] (reporting that Perry pleaded no contest to disorderly conduct in exchange for avoiding zoning and resisting arrest charges).

<sup>22</sup> Penrod, *supra* note 16.

nationally,<sup>23</sup> but what we do know is troubling. Misdemeanors have grown in number and their consequences have escalated dramatically.<sup>24</sup> The fact that an elderly woman without a criminal record can go to jail for a brown lawn and a teenager can go to jail for over fifty days for a minor first-time offense demonstrates the problem that we are facing in America.<sup>25</sup> The number of misdemeanors processed in U.S. courts has risen from 5 million in 1972 to over 10.5 million today.<sup>26</sup> In 2016, as many as 13.2 million misdemeanor cases were

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<sup>23</sup> Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732 (2017) (“While the Bureau of Justice Statistics has collected extensive information about more serious crimes, there are no nationally representative data available on the numbers of misdemeanor arrests and convictions, let alone data about pretrial detention rates, bail, or sentencing.”).

<sup>24</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (noting that misdemeanors account for bulk of cases in criminal court today with as many as ten million misdemeanors filed each year in United States versus 2.3 million felonies filed); see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014) (explaining how misdemeanor arrests are “largely an artifact of policing practices” and how misdemeanor arrests in New York City have nearly doubled since 1993 as result of affirmative choice to increase misdemeanor arrests by “new political and policing administration”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 294 (2011) (noting that public defenders are overburdened with misdemeanor cases in criminal courts, handling as many as two thousand such cases each year in some jurisdictions); *id.* at 287, 299 (noting that consequences of misdemeanor convictions are far-reaching, impacting immigration status, ability to qualify for public benefits, employment, and choice of residence).

<sup>25</sup> Malcolm Jenkins et al., *NFL Players: Behind ‘Take a Knee’ Lies Racial Injustice*, CNN (Oct. 16, 2017, 5:32 PM), <http://www.cnn.com/2017/10/16/opinions/nfl-bail-reform-opinion/index.html> [<https://perma.cc/5ZM9-Z5X4>] (discussing how United States’ largely monetized bail system impacts poor offenders, particularly in communities of color); see also Nicholas Loffredo, *Unconstitutional to Jail Poor Defendants Who Can’t Pay Bail, Feds Argue*, NEWSWEEK (Aug. 20, 2016, 6:53 PM), <http://www.newsweek.com/unconstitutional-jail-poor-cant-pay-bail-492144> [<https://perma.cc/G2LT-TDZU>] (describing incident where defendant was arrested for misdemeanor offense of “walking while intoxicated” and held for six days because he could not pay \$160 bail); Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed with Inmates*, NPR (Jan. 21, 2010, 2:00 PM), <http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates> [<https://perma.cc/C54L-9RS3>] (reporting that defendant stole some blankets to keep warm and was arrested and held for over six months because he could not pay \$3500 bail).

<sup>26</sup> ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASS’N CRIM. DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 11 (2009), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> [<https://perma.cc/7UW6-AJAF>] (estimating total number of misdemeanor prosecutions in 2006 by extrapolating from rate calculated from twelve states’ misdemeanor rates).

filed in the United States.<sup>27</sup> This amounts to “an average of 4261 misdemeanor cases per 100,000 people.”<sup>28</sup> Of the 630,000 people in local jails in 2017, the overwhelming majority (443,000) were unconvicted individuals who could not afford bail, but would be safe to release,<sup>29</sup> and about one-third (187,000) are people serving short sentences for misdemeanor violations.<sup>30</sup> The vast majority of these misdemeanor defendants—up to eighty-five percent—are locked up for nonviolent and minor offenses.<sup>31</sup> It would not be an exaggeration to say that our jail overcrowding problem could disappear if we solved the misdemeanor problem.

Misdemeanor bail decisions, like Richardson’s, are made thousands of times every day in courts all across the country. A magistrate judge often makes a two-minute decision to set bail or release an individual based on no evidence, no lawyers, and without considering whether a person can pay the bail set.<sup>32</sup> But these decisions heavily impact the lives of poor Americans across the country

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<sup>27</sup> Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 745 (2018) (discussing how, though this number is startling, according to research, number of misdemeanor cases filed in court has consistently dropped in last decade; still, misdemeanors comprise bulk of cases in criminal court today, outnumbering felony cases by three to one).

<sup>28</sup> *Id.*

<sup>29</sup> Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497 app. A at 570 (2012). Only six percent of jail inmates (or 40,000 out of 630,000) in 2017 were charged with violent offenses, and even of those, many are still safe to release depending on other factors in their background. *See id.* (stating vast majority of felony defendants are safe to release before trial, particularly those with no prior violent crime history).

<sup>30</sup> Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie*, PRISON POL’Y INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> [<https://perma.cc/4UY9-A7FQ>] (noting that in state and local jurisdictions, nonviolent drug offenders do not make up substantial portion of prison population, but “nonviolent drug convictions are a defining characteristic of the federal prison system”).

<sup>31</sup> Megan Stevenson & Sandra Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 23 (Erik Luna ed., 2017) [http://academyforjustice.org/wp-content/uploads/2017/10/2\\_Reforming-Criminal-Justice\\_Vol\\_3\\_Pretrial-Detention-and-Bail.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf), [<https://perma.cc/A8V2-C5HL>] (“At least as of 2002, 65% of pretrial detainees were held on non-violent charges only, and 20% were charged with minor public-order offenses.”).

<sup>32</sup> Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 5 (Feb. 10, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2777615> [<https://perma.cc/N83R-V6HN>] (explaining how bail hearings in Philadelphia take no more than one minute); *see also* Heaton, Mayson & Stevenson, *supra* note 23, at 730 (explaining bail hearings in Harris County, Texas, “are typically handled in an assembly-line fashion, with some hearings lasting approximately a minute”). Nationally, twenty-five percent of misdemeanor defendants never get lawyers. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T JUST., DEFENSE COUNSEL IN CRIMINAL CASES (2000), <https://www.bjs.gov/content/pub/ascii/dccc.txt> [<https://perma.cc/EPH9-9B2C>].

and tell an important story about justice in America.<sup>33</sup> Our broken bail system is the “single most preventable cause of mass incarceration in America”—and it starts with misdemeanors.<sup>34</sup>

Bail is out of reach for more than eighty percent of defendants who simply do not have the money.<sup>35</sup> Because few lower-income Americans are able to make bail, thousands of individuals sit in jail for months while they are clothed with a presumption of innocence and while no evidence has been introduced against them.<sup>36</sup> In New York, only twelve percent of defendants are able to afford bail at arraignment.<sup>37</sup> In some areas, the number is below ten percent.<sup>38</sup> Approximately twenty-seven thousand juveniles nationwide sit in detention centers because they cannot make bail.<sup>39</sup> Though the U.S. criminal justice system has long recognized bail as a constitutional right, it is estimated that at least twenty-five percent more felony defendants could be safely released on bail

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<sup>33</sup> BAUGHMAN, *supra* note 5, at 159. Studies have shown that being denied bail or being unable to pay bail substantially impacts an individual’s personal life and has been linked with “decreased employment rates, lower wages, physical and psychological conditions, damaged familial bonds, and higher rates of recidivism.” Meghan Sacks & Alissa Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment*, 25 CRIM. JUST. POL’Y REV. 59, 63 (2014). When defendants are denied bail or are unable to pay bail, it can also distort the outcome of a criminal case. *Id.* at 71. A defendant held on bail has an impaired ability to effectively defend her case. *Id.* (citing Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1032 (1954)). Moreover, it can incentivize guilty pleas, even where defendants are innocent. Heaton, Mayson & Stevenson, *supra* note 23, at 715. Pretrial detention has been connected with increased chances of conviction and harsher, longer sentences. Sacks & Ackerman, *supra* note 33, at 63. Defendants held on bail also make up a significant portion of the United States’ jail population. *See* Baradaran & McIntyre, *supra* note 29, at 502 n.15 (estimating pretrial detainees make up as much as sixty-two percent of jail population).

<sup>34</sup> BAUGHMAN, *supra* note 5, at 2.

<sup>35</sup> THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP’T JUST., BUREAU JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 7 tbl.6 (2010), <https://www.bjs.gov/content/pub/pdf/fdluc06.pdf> [<https://perma.cc/GTP7-DKFC>] (demonstrating that of felony defendants who are not released, only twelve percent are denied bail and eighty eight percent simply cannot afford it); *see also* BAUGHMAN, *supra* note 5, at 173 (discussing Harris County, Texas, where eighty percent of jail population was found to be incarcerated for failure to make bail); Eesha Pandit, *Criminal Injustice in Texas: Thousands Stay Jailed in Just One County Because They Can’t Pay Bail—and It’s Happening All over the U.S.*, SALON (June 5, 2016, 9:00 AM), [http://www.salon.com/2016/06/05/criminal\\_injustice\\_in\\_texas\\_thousands\\_stay\\_jailed\\_in\\_just\\_one\\_county\\_because\\_they\\_cant\\_pay\\_bail\\_and\\_its\\_happening\\_all\\_over\\_the\\_u\\_s/](http://www.salon.com/2016/06/05/criminal_injustice_in_texas_thousands_stay_jailed_in_just_one_county_because_they_cant_pay_bail_and_its_happening_all_over_the_u_s/) [<https://perma.cc/9MQT-Q5HY>] (reporting work of lawyers attempting to end discriminatory bail practices).

<sup>36</sup> BAUGHMAN, *supra* note 5, at 111.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

and yet wait in jail.<sup>40</sup> The number is much higher for misdemeanors but has not been appropriately studied or documented.<sup>41</sup> In the years since the Bail Reform Act of 1984, “pretrial detention has become the norm rather than the exception.”<sup>42</sup> In fact, “[s]ince the 1990s, pretrial detention rates have risen 72 percent, with the number of unconvicted people in US jails having increased by 59 percent.”<sup>43</sup> These bail-related increases account for ninety-nine percent of the increase in the overall jail population.<sup>44</sup>

The impacts of a misdemeanor charge are major, even though as many as eighty percent of these charges are dismissed in some jurisdictions.<sup>45</sup> This huge arc toward pretrial detention harms criminal outcomes: A 2013 study found that defendants detained before trial are three to four times more likely to be sentenced to incarceration than those on pretrial release and tend to receive longer sentences.<sup>46</sup> Pretrial detention also leads to future arrests for other crimes, even for people charged with misdemeanors.<sup>47</sup> Even those in jail on a misdemeanor charge for only a couple days are harmed in the long run by suffering from increased recidivism.<sup>48</sup> This short detention has huge

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<sup>40</sup> *Id.*

<sup>41</sup> *Cf.* Heaton, Mayson & Stevenson, *supra* note 23, at 724-25 (discussing difficulties in empirically researching pretrial release).

<sup>42</sup> BAUGHMAN, *supra* note 5, at 3.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.*

<sup>45</sup> Angela Caputo, *Charges Dismissed*, CHI. REPORTER (Nov. 4, 2013), <http://www.chicagoreporter.com/charges-dismissed/> [<https://perma.cc/VY2L-ZGXZ>] (reporting on “parade” of misdemeanor defendants in Chicago courts and newspaper’s own analysis of 1.4 million records in Cook County, Illinois, showing that eight out of ten misdemeanor cases were dismissed between 2006 and 2012); *see also* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 738 (2017) (“Every year, misdemeanor convictions saddle millions of Americans with consequences affecting their liberty, housing, employment, education, and immigration status.”); Kohler-Hausmann, *supra* note 24, at 621 (noting that recent increase in availability of criminal records and proliferation of regulations excluding those with records from important government benefits, such as student loans and housing, has deepened collateral consequences borne by misdemeanor defendants); Roberts, *supra* note 24, at 286-87 (“[S]addling large numbers of individuals with permanent criminal records significantly impedes access to employment. This leads to more crime among those individuals, thus undermining public safety.”).

<sup>46</sup> Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161, 1170 (2016).

<sup>47</sup> *Id.* (concluding defendants were nearly forty percent more likely to commit crime before trial when held two to three days).

<sup>48</sup> CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 11 (Nov. 2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf) [<https://perma.cc/8A84-AEBH>] (finding that defendants held for just four to seven days had thirty-five percent increased rate of recidivism over those held less than twenty-four



consequences for a crime that may not ultimately be of enough significance for a prosecutor to pursue.

Misdemeanor, particularly petty misdemeanor, cases account for the vast majority of cases in criminal courts today.<sup>49</sup> Over sixty percent of people in jails across the United States are unconvicted—most of those people are in jail because they cannot afford money bail.<sup>50</sup> From 2000 to 2014, accused people accounted for ninety-five percent of jail population growth nationally.<sup>51</sup> The vast majority of these detainees had been charged with non-violent acts.<sup>52</sup> In New York City in 2008, for example, seventeen thousand defendants, charged mostly with non-violent crimes, such as jumping a subway turnstile, were unable to make bail set at \$1000 or less and spent an average of sixteen days in jail.<sup>53</sup> In fact, misdemeanants “routinely plead guilty to get out of jail because they cannot afford bail.”<sup>54</sup> Because misdemeanor charges vastly outpace felony charges, “flooding lower courts, jails, probation offices, and public defender offices,” our current “felony-centric view” of criminal processes does not represent the reality of the U.S. criminal justice system.<sup>55</sup>

hours, while those held eight to fourteen days had fifty-one percent greater chance of recidivism).

<sup>49</sup> Natapoff, *supra* note 24, at 1063 (noting about ten million misdemeanors are filed each year compared to roughly two million felony cases); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314 (2012) (explaining difference between prisons and jails and noting most individuals in prison are felons).

<sup>50</sup> Thompson, *supra* note 46, at 1168.

<sup>51</sup> TODD D. MINTON & ZHEN ZENG, U.S. DEP’T JUST., BUREAU JUST. STAT., JAIL INMATES AT MIDYEAR 2014, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf> [<https://perma.cc/ATT7-5FMD>].

<sup>52</sup> BAUGHMAN, *supra* note 5, at 4-5.

<sup>53</sup> *Id.* at 85.

<sup>54</sup> Natapoff, *supra* note 49, at 1313; *see also* Malcom Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), [https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a\\_story.html?utm\\_term=.99593ea9c3d2](https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html?utm_term=.99593ea9c3d2) [<https://perma.cc/H4P8-ZLHE>] (“In the past year, 45 defendants were exonerated after pleading guilty to low-level drug crimes in Harris County, Tex. They were cleared months or years after conviction by lab tests that found no illegal drugs in the materials seized from them. Why then did they plead guilty? As best we can tell, most were held in jail because they couldn’t make bail. When they were brought to court for the first time, they were given a take-it-or-leave-it, for-today-only offer: Plead guilty and get probation or weeks to months in jail. If they refused, they’d wait in jail for months, if not a year or more, before they got to trial, and risk additional years in prison if they were convicted. That’s a high price to pay for a chance to prove one’s innocence.”).

<sup>55</sup> Natapoff, *supra* note 49, at 1315 n.8 (2012) (estimating eighty percent of state prosecutor caseloads are misdemeanors). *See generally* Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 539 (2016) (discussing “new policing” model of 1990s that focused on disrupting criminal activities through tactics such as concentrated misdemeanor arrests, resulting in major increases in misdemeanor convictions over previous decades).

Historical perspective on the current misdemeanor problem is critical to formulating a reasoned approach to addressing it. The history of misdemeanors reveals that they started as all crimes that were not felonies.<sup>56</sup> This important historical analysis of misdemeanors is missing in our modern understanding of how misdemeanor law developed, what constitutes a misdemeanor, and how to deal with them. Interestingly, misdemeanors are more numerous than felonies.<sup>57</sup> They have clogged the courts from common law England to the post-Civil War courts of the South to the busy American courts of today.<sup>58</sup> One major difference in how misdemeanors were treated historically is that defendants were always guaranteed bail.<sup>59</sup> Misdemeanor judges faced fines when they did not release individuals charged with misdemeanors on bail as it was a right guaranteed by due process.<sup>60</sup> During this time, felonies were few in number and only the most serious crimes, such as capital offenses.<sup>61</sup> Misdemeanors, on the other hand, ranged from assault and battery to prostitution to theft, and all required bail.<sup>62</sup> Today, the nature of felonies has changed such that felonies are numerous and not just dangerous or violent crimes, but ordinary activities.<sup>63</sup> This growth has led at least one commentator to argue that an average American commits three felonies a day.<sup>64</sup>

While the consequences for minor misdemeanor crimes have greatly increased from the English common law, misdemeanors themselves have not

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<sup>56</sup> See 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 2 (Kay & Brother 5th rev. ed. 1861) (1846) (“Misdemeanors comprise all offences lower than felonies, which may be the subject of indictment.”); see also 1 JOEL PRENTISS BISHOP, A TREATISE ON CRIMINAL LAW 425 (T.H. Flood & Co. 9th ed. 1923) (defining misdemeanor as “trespass against good morals or the public peace as tends to injure the public, either directly or consequently, but does not amount to a felony”); 1 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW 21 (1897) (“As used in the American colonies, the popular distinction seems to have been, however, between offenses punishable with death and those not so punishable.”).

<sup>57</sup> See Natapoff, *supra* note 24, at 1063 (noting that misdemeanor cases comprise around eighty percent of state dockets).

<sup>58</sup> Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, OXFORD HANDBOOKS ONLINE, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-92-3> [<https://perma.cc/9C8F-ABVK>] (last visited Jan. 31, 2018).

<sup>59</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*1002.

<sup>60</sup> *Id.*

<sup>61</sup> LEWIS HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE 22-23 (The Baltimore Book Co. 2d ed. 1904) (1887) (naming common law felonies as “arson, burglary, larceny, murder and manslaughter, rape, robbery, sodomy and mayhem”).

<sup>62</sup> *Id.* at 23 (listing misdemeanor crimes).

<sup>63</sup> See generally HARVEY SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011).

<sup>64</sup> See generally *id.* (examining increase in codified law which allows many actions to be criminally prosecuted).

changed. They are still less serious crimes.<sup>65</sup> A misdemeanor charge should still maintain the same due process rights it came with historically.<sup>66</sup> These rights include the right to release before trial.<sup>67</sup> By their nature, misdemeanor defendants do not pose a serious safety risk to the public, nor are they a flight risk. And a defendant should have the right to release unless there is a rare exception. An empty bank account should never stop a defendant from obtaining release before trial.<sup>68</sup>

A historical analysis of misdemeanors reveals that there are remarkable similarities between misdemeanors historically and today. One is the revolving-door-nature of crimes. People have always been in and out of court for drunkenness, petty theft, assault, and other misdemeanor crimes.<sup>69</sup> There have always been a lot more misdemeanors in the system than the system can process—even in common law England.<sup>70</sup> Misdemeanors have been referred to as the “plankton” of the criminal justice system for this very reason.<sup>71</sup> However, given the changing nature of punishment today, misdemeanors have become as important as serious felonies in the lives of those convicted.<sup>72</sup> The fact is that in today’s criminal justice system, the impact of a misdemeanor on a defendant’s life can be as great as that of a felony.<sup>73</sup> Many misdemeanor convictions can lead

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<sup>65</sup> See *infra* note 97 and accompanying text.

<sup>66</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 782.

<sup>67</sup> *Id.* at 776.

<sup>68</sup> Unfortunately, “some magistrates tend to set bail at unaffordable rates,” which causes misdemeanor detention based only on her inability to afford bail. *Id.* at 727.

<sup>69</sup> LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 83 (2004); see also 6 JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 272 (2003).

<sup>70</sup> See BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 26 (noting that many courts have “dockets . . . clogged with crimes” such as turnstile jumping, underage possession of alcohol, and other misdemeanors).

<sup>71</sup> FRIEDMAN, *supra* note 69, at 83.

<sup>72</sup> See *infra* note 77 and accompanying text.

<sup>73</sup> Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715 (2017) (discussing how misdemeanants can receive “jail time, heavy fines, invasive probation requirements . . . deportation, loss of child custody, ineligibility for public services, and barriers to finding employment and housing”). The authors’ extensive study of Harris County, Texas, misdemeanors found that excessive pretrial detention “causes large numbers of first-time alleged misdemeanants to be convicted and sentenced to jail time, rather than receiving intermediate sanctions or avoiding a criminal conviction altogether” because pretrial detainees are “25% more likely . . . to plead guilty . . . [and] 43% more likely to be sentenced to jail.” *Id.* at 711, 749; see also BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 11 (discussing serious consequences misdemeanor convictions cause for future criminal charges and noting, for example, that defendant previously convicted of misdemeanor and serving thirty days in jail is ineligible for reduced sentence later for federal drug charge); N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2013, at 22, 30 ex. 18 (2014) (reporting that

to automatic deportation.<sup>74</sup> Even those who do not face deportation still face life-altering consequences. Many have to serve jail time.<sup>75</sup> Then there are the collateral consequences, which can be “more dire than any direct criminal penalty.”<sup>76</sup> Other consequences of misdemeanor convictions include sex offender registration, the loss of federal student loans, and eviction from public housing for entire families.<sup>77</sup> And loss of employment and the inability to find work is, by far, the most devastating consequence for convicted misdemeanants.<sup>78</sup> These consequences would not harm so many Americans if their rights to release before trial were respected.

This Article provides historical context to misdemeanor crimes and misdemeanor bail decisions. It demonstrates that misdemeanor crimes were formerly minor and few and now number in the hundreds and are accompanied by major negative implications.<sup>79</sup> The definition of misdemeanors over time, while still technically very similar, has changed tremendously in meaning and impact. Bail decisions for misdemeanors have also drastically changed. Misdemeanants formerly received bail as a nearly absolute constitutional right, but now in many jurisdictions bail is no longer automatic for misdemeanor crimes.<sup>80</sup> Many misdemeanor defendants are held in jail simply because they cannot afford bail—which is burdensome for even minor crimes.<sup>81</sup> This Article is neither a comprehensive, nor the authoritative history of misdemeanor bail or any of the topics discussed herein. Instead, it simply hopes to start a conversation about these points with the goal of sparking more interest in research of misdemeanor bail and the rights that should accompany it.

The remainder of this Article will proceed as follows. Part I contains a brief history and definition of misdemeanor crimes. It defines misdemeanors carefully in both their historical and current forms and discusses the difference in how these crimes have been defined over time. The major lesson learned here is that

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when bail was \$500 or less, more non-felony defendants (forty-six percent) than felony defendants (thirty percent) were detained pretrial).

<sup>74</sup> Roberts, *supra* note 24, at 298; *see also* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (noting that immigration officials use arrest records to screen unauthorized immigrants and winnow eleven million down to four hundred thousand per year to deport).

<sup>75</sup> *See* Lynn Thompson, *Settlement over Snohomish County Jail Death Totals \$2.4M*, SEATTLE TIMES (July 27, 2015), <https://www.seattletimes.com/seattle-news/crime/snohomish-county-will-pay-family-of-man-who-died-in-jail/> [https://perma.cc/Y9ZF-D7LE] (reporting that Snohomish County, Washington, was recently ordered to pay \$2.4 million to family of man who died of medical complications after being jailed for pot offense).

<sup>76</sup> Roberts, *supra* note 24, at 277.

<sup>77</sup> *Id.* at 299.

<sup>78</sup> *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 12.

<sup>79</sup> *See supra* note 24 and accompanying text.

<sup>80</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 719-21.

<sup>81</sup> *Id.* at 713.

misdemeanor crimes have always been less serious, and most of them are nonviolent. The other major change is that the number of misdemeanor crimes on the books has grown exponentially, which also increases the numbers of individuals impacted by misdemeanors.<sup>82</sup> Part II describes the changes in bail for misdemeanor crimes—historically and today. It demonstrates that even though some misdemeanor crimes were much more serious under the common law, these charges came with a guarantee of bail. And historically, bail was not based on ability to pay. Part III discusses the impact of misdemeanors on a defendant's life. It demonstrates that although—by definition and perception—a misdemeanor is a minor offense, its impacts on an individual are life-altering. This was never the case historically and today it is an unintended consequence of a phenomenon that has been largely ignored by policy makers and academics.<sup>83</sup> The hope here is that with further discussion of the changes in misdemeanors, and particularly the changes in misdemeanor bail, we can work towards releasing more individuals before trial, thereby reducing the impact of misdemeanors on incarceration rates.

#### I. DEFINING MISDEMEANORS THEN AND NOW

A misdemeanor is a minor criminal offense. Historically, a misdemeanor was an act that had “smaller faults, and omissions of less consequence” than a felony.<sup>84</sup> The distinction between a felony and misdemeanor is important because as far back as the Middle Ages jurisdictions have used different procedural approaches for minor crimes as compared to major crimes.<sup>85</sup> Understanding the historical perspective of misdemeanors helps us put into context how we treat misdemeanors today. Historically, misdemeanors included both minor and—by today's standards—relatively more serious offenses, such

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<sup>82</sup> See *supra* note 24 and accompanying text.

<sup>83</sup> See, e.g., *Virginia v. Moore*, 553 U.S. 164, 177-78 (2008) (holding that officers could arrest motorist for driving with suspended license, even though this misdemeanor was minor offense for which officers would normally only issue citation); *Lewis v. United States*, 518 U.S. 322, 330 (1996) (holding that obstructing mail was “petty” offense, only punishable by six months and therefore defendant not entitled to jury trial); see also BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 7 (“Defenders and judges across the country noted that misdemeanor dockets are clogged with crimes that they believe should not be punishable with expensive incarceration. Right now, taxpayers . . . lock up misdemeanants accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, dog leash violations, driving with a suspended license, pedestrian solicitation, and feeding the homeless. These crimes do not impact public safety.”); Kohler-Hausmann, *supra* note 24, at 630-31 (discussing Giuliani Administration's deliberate turn to focusing on “low-level” offenses in New York City, including “drug possession, petit larceny, unlicensed vending, misdemeanor physical altercations, public alcohol consumption, turnstile jumping, prostitution, and disorderly conduct”).

<sup>84</sup> See BLACKSTONE, *supra* note 59, at \*848.

<sup>85</sup> See generally *id.*

as kidnapping, conspiracy, counterfeiting, forgery, and assault and battery, and other less serious crimes, such as cheating and defamation.<sup>86</sup> Felonies have always been more serious than misdemeanors.

In the Middle Ages and up until the nineteenth century, many more offenses were considered capital crimes than are now.<sup>87</sup> Glanville, an early scholar of the English common law who wrote during the reign of Henry II, explained that criminal offenses were divided between “the King’s Crown only, and such as fall within the Jurisdiction of the Sheriffs of Counties.”<sup>88</sup> The King’s Crown heard capital offenses and those punishable by “loss of Member,” such as murder and treason, while sheriffs heard misdemeanors.<sup>89</sup> The latter included such offenses as theft and “[s]cuffles, blows, and wounds.”<sup>90</sup> Medieval misdemeanors were “almost unlimited in scope,”<sup>91</sup> and included cutting off ears, maiming, simple battery,<sup>92</sup> criminal trespass, “harbouring idle and suspect persons,”<sup>93</sup> “keeping houses of ill repute,”<sup>94</sup> and petty larceny.<sup>95</sup> In some cases, under the early English common law, crimes that would command a ten year felony sentence today (like maiming), were considered misdemeanors.<sup>96</sup> Thus,

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<sup>86</sup> HOCHHEIMER, *supra* note 61, at 23. Misdemeanors included:

Attempts and conspiracies (including solicitation and incitement); cheating, counterfeiting and forgery; assault and battery; false imprisonment; kidnapping; wilful [sic] injury to the person; defamation (libel) of private persons, forcible entry, detainer and trespass; malicious mischief done to any kind of property; malicious hurt inflicted upon animals; affray; dueling; riot, rout and unlawful assembly; nuisances; obstructions of justice and government; barratry, champerty and maintenance.

*Id.*

<sup>87</sup> JULIAN B. KNOWLES, *THE ABOLITION OF THE DEATH PENALTY IN THE UNITED KINGDOM: HOW IT HAPPENED AND WHY IT STILL MATTERS* 9 (2015); William W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 U. RICH. L. REV. 793, 795 (2007); see also Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 707-08 (2003) (arguing that part of Blackstone’s purpose in writing commentaries was to reform English criminal law, including “general proliferation of capital offenses [that] had led not to effective prevention but to . . . contempt for the law by offenders of all sorts”).

<sup>88</sup> A TRANSLATION OF GLANVILLE 3 (John Beames trans., John Byrne and Co. 1900) (authorized facsimile of the original, University Microfilms, 1969).

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *Id.* at 3.

<sup>91</sup> BAKER, *supra* note 69, at 553 n.1.

<sup>92</sup> *Id.* at 553 & n.3.

<sup>93</sup> *Id.* at 272.

<sup>94</sup> *Id.* at 273.

<sup>95</sup> *Id.* at 570.

<sup>96</sup> OKLA. STAT. tit. 21, § 759 (2018) (“Any person guilty of maiming another . . . shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections not exceeding life . . .”). Under today’s Federal Sentencing Guidelines, an assault resulting in “Permanent or Life-Threatening Bodily Injury,” which would be the equivalent of a historical maiming or mutilation, would become felony “aggravated assault,” require a seven

under medieval law, crimes that are considered very serious today were misdemeanors.

Under the common law, felonies were crimes which were punishable by death or forfeiture of property—land, goods, or both.<sup>97</sup> This understanding evolved in England but, eventually, early in U.S. history, felonies widely came to be understood as simply those crimes punishable by death or imprisonment of more than one year.<sup>98</sup> Felonies included more serious or violent crimes, such as arson, burglary, murder, and rape.<sup>99</sup> In contrast, misdemeanors were less serious and not punished so harshly. Jurisdictions define misdemeanors differently, but they have long been defined generally as offenses punishable by fines or less than one year of incarceration in a local county jail.<sup>100</sup>

Today's misdemeanor law in the United States grew from centuries of common law, largely from England.<sup>101</sup> In England, common law developed to include three categories of crime: treason, felonies, and misdemeanors.<sup>102</sup> At common law, a misdemeanor was described by referring to its relationship with a felony: "less than a felony."<sup>103</sup> Misdemeanors were handled differently than

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point increase in sentencing level, and would take a defendant's sentence from as little as one year to as many as five years in prison. U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (U.S. SENTENCING COMM'N 2016).

<sup>97</sup> BISHOP, *supra* note 56, at 446-47.

<sup>98</sup> 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 344 (Little, Brown & Co. 6th ed. 1877) (1858). "All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." 18 U.S.C. § 541 (1925).

<sup>99</sup> HOCHHEIMER, *supra* note 61, at 22-23.

<sup>100</sup> BISHOP, *supra* note 98, at 347 ("A misdemeanor is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony . . ."); *see also* CAL. PENAL CODE § 19 (West 2018) ("[E]very offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both."); IDAHO CODE ANN. § 18-113 (West 2018) (providing that, unless otherwise permitted by statute, maximum sentence for a misdemeanor is \$1000 fine and no more than six months in jail); 720 ILL. COMP. STAT. ANN. 5/2-11 (West 2018) ("Misdemeanor means any offense for which a sentence to a term of imprisonment in other than a penitentiary for less than one year may be imposed."); KY. REV. STAT. ANN. § 532.090 (West 2018) (providing that sentence for misdemeanor offense "shall not exceed twelve (12) months"); TENN. CODE ANN. § 39-11-110 (West 2018) ("[A]ll violations of law punishable by fine or confinement for less than one (1) year, or both, are denominated misdemeanors."); VA. CODE ANN. § 18.2-11 (West 2018) (imposing maximum punishment of twelve months in jail and a \$2500 fine); WIS. STAT. ANN. § 939.51 (West 2018) (imposing maximum sentence of nine months in jail and \$10,000 fine for misdemeanors).

<sup>101</sup> JOHN M. SCHEB & JOHN M. SCHEB II., CRIMINAL LAW & PROCEDURE 10 (7th ed. 2010).

<sup>102</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 30 (2d ed. 1986); *see also* MCCLAIN, *supra* note 56, at 20-21. Historically, a misdemeanor was often called a "trespass." BISHOP, *supra* note 98, at 347.

<sup>103</sup> BISHOP, *supra* note 56, at 452; BLACKSTONE, *supra* note 59, at \*1001-02 (asserting that misdemeanors are "inferior" crimes); WHARTON, *supra* note 56, at 2 ("Misdemeanors

more serious crimes<sup>104</sup> as far back as the Middle Ages. For serious crimes, “[t]rial by jury was de rigueur in cases of life and death . . . but not for all misdemeanours. . . . A succession of statutes from the time of Richard II onwards had empowered justices of the peace to try [misdemeanants] . . . without a jury.”<sup>105</sup> Similarly, in the 1990s, Lawrence Friedman explained that though most of us think of trial by jury as the standard in criminal justice, it is actually the exception.<sup>106</sup> Minor criminal courts are the cornerstone of all state criminal justice systems, and most petty crimes have always been determined by judges, not juries.<sup>107</sup>

From the early common law to today, misdemeanors have garnered much less attention from the judiciary and legal scholars than felonies.<sup>108</sup> This status has resulted in poorer development of the law and criminal procedure around misdemeanors, and poorer protection of due process rights.<sup>109</sup> Misdemeanors have historically been handled in lower-level courts, such as municipal courts,

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comprise all offences lower than felonies, which may be the subject of indictment.”); *see also* Commonwealth v. Flaherty, 25 Pa. Super. 490, 494 (1904) (defining misdemeanor as “trespass against good morals or the public peace as tends to injure the public, either directly or consequently, but does not amount to” felony); OLIVER LORENZO BARBOUR, A TREATISE ON THE CRIMINAL LAW OF THE STATE OF NEW-YORK 20 (Gould, Banks & Co. 2d ed. 1852) (1841) (“[T]he terms ‘misdemeanor’ and ‘felony’ are generally used in contradistinction to each other.”); WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL LAW 33 (1894) (“All crimes less than felonies are misdemeanors.”); EMLIN MCCLAIN, *supra* note 56, at 21 (“As used in the American colonies, the popular distinction seems to have been, however, between offenses punishable with death and those not so punishable.”).

<sup>104</sup> A.H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950, at 194 (1980).

<sup>105</sup> BAKER, *supra* note 69, at 522 (emphasis omitted).

<sup>106</sup> FRIEDMAN, *supra* note 69, at 83.

<sup>107</sup> *Id.*; *see also* David Rossman, “Were There No Appeal”: The History of Review in American Criminal Courts, 81 J. CRIM. L. & CRIMINOLOGY 518, 526-27 (1990) (“Justices of the Peace occupied the bottom rung [of the American justice system]. These local magistrates rarely were trained in the law, but were empowered to dispense justice to miscreants who faced only the most minor punishment. Justices of the Peace ordinarily did not preside over jury trials, which all the colonies guaranteed to those charged with non-petty offenses.”).

<sup>108</sup> Natapoff, *supra* note 49, at 1355-56. *See generally* MALCOLM M. FEELEY, PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (laying groundwork for modern discussion with its examination of misdemeanor and lower felony defendants and lost wages, wasted time, and other informal penalties they suffered in neglected lower court system).

<sup>109</sup> BAKER, *supra* note 69, at 553 n.1 (“Misdemeanors were almost unlimited in scope and received much less discussion in the learned authorities. The law was probably still fairly crude. . . . In some cases parties were still punished without trial.”); Stephanos Bibas, *Bulk Misdemeanor Justice*, 85 S. CAL. L. REV. POSTSCRIPT 73, 76 (2012) (“Today, victims, ordinary citizens, and even defendants themselves are shut out of the system. Police arrest, effectively charge, and stand ready to testify; prosecutors move cases along, often with defense counsel’s complicity; and judges rubber-stamp standard bargains.”).



police courts, or justice of the peace courts.<sup>110</sup> Lawrence Friedman explains: “Here thousands of cases get processed, the plankton of the criminal justice system: cases of drunkenness, petty theft, vagrancy. . . . [T]he defendants in these courts constitute an ‘army of defeat,’ shiftless ‘derelicts,’ ‘driftwood cast upon a turbulent sea.’”<sup>111</sup> The typical defendants in these courts throughout modern history have been the poor, desperate, marginal, and drunk, and they usually were not represented by counsel.<sup>112</sup> Historically, misdemeanor courts were also a “revolving door” as defendants would come to court and “lose, serve a while, get out; and soon be back again.”<sup>113</sup> Eventually, the middle class also ended up in misdemeanor court after the passing of automobile and traffic laws in the 1900s.<sup>114</sup> And from this point on, misdemeanors proliferated in number and popularity in U.S. jurisdictions.<sup>115</sup>

Today, misdemeanors are often distinguished based on the seriousness of the crime. Jurisdictions use numerous different classifications to signal the level of seriousness of the misdemeanor.<sup>116</sup> Most states classify misdemeanors into

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<sup>110</sup> FRIEDMAN, *supra* note 69, at 83. *See generally* BORUCHOWITZ, BRINK & DIMINO, *supra* note 26 (discussing crushing caseloads of state courts handling misdemeanor offenses, leading to lack of due process for indigent offenders).

<sup>111</sup> FRIEDMAN, *supra* note 69, at 83.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (footnotes omitted). “In Suffolk County, Massachusetts, there were 88,222 prosecutions in 1931-1934. No fewer than 39,614 of these were for drunkenness, and 26,433 for ‘violating motor vehicle and traffic laws.’” *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> A 2009 report of the National Association of Criminal Defense Lawyers called the growth of misdemeanor cases “explosive,” saying it is “placing a staggering burden on America’s courts.” BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 7. The report found the total number of misdemeanor prosecutions nationwide in 2006 to be an estimated 10.5 million, *id.* at 11, and pointed to “overcriminalization” as a major cause of burdensome misdemeanor caseloads in state courts, noting researchers’ concern that “the ardent enforcement of crimes that were once simply deemed undesirable behavior and punished by societal means or a civil infraction punishable by a fine” now clogs dockets, *id.* at 25. In one court in Grand Traverse County, Michigan, about ten percent of total cases are for driving on a suspended license, with most defendants having no other criminal record, and only lacking the money to pay parking, speeding, or other traffic fines. *Id.* at 26. For further discussion, see Kohler-Hausmann, *supra* note 24, at 611 (discussing how New York City led era of mass misdemeanors across nation with its efforts to target “low-level offenses as part of its quality-of-life and urban crime control strategy”). Misdemeanor arrests in New York City increased fourfold between 1980 and 2011, from about sixty-five thousand to about two hundred fifty thousand per year. *Id.* at 639; *see also* ELIZABETH NEELEY, LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT 1 (2008), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1027&context=publicpolicypublications> (reporting that Lancaster County, Nebraska, has seen fifty-six percent increase in misdemeanor cases just from about 2003 to 2007).

<sup>116</sup> *See* ARK. CODE ANN. § 5-1-107 (2017) (classifying misdemeanors from “A” to “C” depending on seriousness of offense); CONN. GEN. STAT. ANN. § 53a-26 (West 2018); DEL.

classes A, B, and C—from most to least serious. Examples of class A misdemeanors include possession of a controlled substance<sup>117</sup> and burglary.<sup>118</sup> class B misdemeanors are less serious and include indecent exposure<sup>119</sup> and certain types of assault.<sup>120</sup> class C includes leaving a child unattended in a car<sup>121</sup> and theft of property worth less than \$500.<sup>122</sup> Some state jurisdictions follow this model, while others separate misdemeanors into three classes: high or gross misdemeanors, ordinary misdemeanors, and petty misdemeanors.<sup>123</sup> A petty misdemeanor usually comes with a jail sentence of less than six months and a fine of \$500 or less,<sup>124</sup> where a gross misdemeanor can come with up to a year of jail time, or possibly even prison time.<sup>125</sup>

Misdemeanors today cover a broad range of minor criminal conduct. It is difficult to give an exhaustive list of misdemeanors because there are so many and the distinctions vary by jurisdiction.<sup>126</sup> Misdemeanors include offenses

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CODE ANN. tit. 11, § 4202 (2018); IOWA CODE ANN. § 701.8 (West 2017) (classifying misdemeanors as “aggravated,” “serious,” and “simple”); KY. REV. STAT. ANN. § 532.090 (West 2018); NEV. REV. STAT. ANN. § 193.120 (West 2017); N.H. REV. STAT. ANN. § 625:9 (West 2018); TEX. PENAL CODE ANN. § 12.03 (West 2017); UTAH CODE ANN. § 76-3-104 (West 2017); WIS. STAT. ANN. § 939.51 (West 2018).

<sup>117</sup> See, e.g., KY. REV. STAT. ANN. § 218A.1416.

<sup>118</sup> See, e.g., N.C. GEN. STAT. ANN. § 14-54 (West 2018).

<sup>119</sup> See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 3127 (West 2018) (punishing offenders with lesser misdemeanor if none of witnesses present are less than sixteen years of age).

<sup>120</sup> See, e.g., TENN. CODE ANN. § 39-13-101 (West 2018) (noting that if person commits assault and “[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative,” such offense will be charged as class B misdemeanor).

<sup>121</sup> See, e.g., TEX. PENAL CODE ANN. § 22.10.

<sup>122</sup> See, e.g., COLO. REV. STAT. ANN. § 18-4-401 (West 2018).

<sup>123</sup> Accord MINN. R. CRIM. P. 1.04 (distinguishing between misdemeanor and gross misdemeanor); MINN. R. CRIM. P. 23.01 (defining petty misdemeanor as crime punishable by maximum fine of \$300).

<sup>124</sup> See WIS. STAT. ANN. § 939.51 (West 2018) (providing that maximum sentence for class C misdemeanor is \$500 fine and no more than thirty days in jail); see also VA. CODE ANN. § 18.2-11 (West 2018) (providing that maximum sentence on class C misdemeanor is \$500 fine).

<sup>125</sup> See NEV. REV. STAT. ANN. § 193.140 (West 2017) (providing that maximum sentence on gross misdemeanor is 364 days in jail and \$2,000 fine).

<sup>126</sup> *Commonwealth v. Flaherty*, 25 Pa. Super. 490, 493 (1904) (“Misdemeanors are either by statute or at common law. Statutable misdemeanors cannot be comprehended under a precise and specific definition because the offenses themselves which the respective statutes have so denominated are various and diversified, but have one characteristic distinction of being ‘less than felony’ in common.”).

against individual people, property,<sup>127</sup> the state,<sup>128</sup> animals,<sup>129</sup> or the public.<sup>130</sup> Overwhelmingly, these are not serious crimes today—unlike in medieval England.<sup>131</sup> A misdemeanor might be petty theft or assault.<sup>132</sup> Some common misdemeanors in jurisdictions throughout the United States include shoplifting,<sup>133</sup> public lewdness,<sup>134</sup> criminal mischief,<sup>135</sup> harassment,<sup>136</sup> some forms of credit card fraud,<sup>137</sup> animal cruelty,<sup>138</sup> criminal trespass,<sup>139</sup> and graffiti vandalism.<sup>140</sup> Depending on the circumstances, misdemeanors can be enhanced to felony offenses. For example, with crimes involving theft of currency, the sum taken can determine whether the crime constitutes a misdemeanor or a felony.<sup>141</sup> The defendant's criminal history can also determine whether the offense is charged as a misdemeanor. For instance, in some states, a single retail theft is a misdemeanor, but any subsequent convictions for retail theft will be treated as felonies.<sup>142</sup>

A major change today is that the number of misdemeanor crimes on the books have grown exponentially over the years. The common law recognized no more than a few dozen separate misdemeanor offenses.<sup>143</sup> Today, there are hundreds.<sup>144</sup> Research shows that over the last two centuries state and federal

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<sup>127</sup> See, e.g., ALASKA STAT. ANN. § 11.46.320 (West 2017) (describing first degree criminal trespass as class A misdemeanor); N.Y. PENAL LAW § 140.15 (McKinney 2018) (describing second degree criminal trespass as class A misdemeanor).

<sup>128</sup> See, e.g., ALASKA STAT. ANN. § 11.46.484 (describing fourth degree criminal mischief as class A misdemeanor); N.Y. PENAL LAW § 145.00 (same).

<sup>129</sup> See, e.g., ALASKA STAT. ANN. § 11.61.140 (stating that animal cruelty is class A misdemeanor); CAL. PENAL CODE § 597t (West 2018) (stating that keeping confined animal and failing to provide “adequate exercise” is misdemeanor).

<sup>130</sup> See, e.g., N.Y. PENAL LAW § 245.00 (“Public lewdness is a class B misdemeanor.”).

<sup>131</sup> See *supra* Part I.

<sup>132</sup> See, e.g., CAL. PENAL CODE § 490.2 (petty theft); MINN. STAT. ANN. § 609.224 (West 2017) (assault).

<sup>133</sup> See, e.g., CAL. PENAL CODE § 459.5.

<sup>134</sup> See, e.g., N.Y. PENAL LAW § 245.00.

<sup>135</sup> See, e.g., IND. CODE ANN. § 35-43-1-2 (West 2018).

<sup>136</sup> See, e.g., *id.* § 35-45-2-2.

<sup>137</sup> See, e.g., CAL. PENAL CODE § 502.6; 720 ILL. COMP. STAT. ANN. 5/17-37 (West 2018); KY. REV. STAT. ANN. § 434.640 (West 2018).

<sup>138</sup> See, e.g., GA. CODE ANN. § 16-12-4 (West 2017).

<sup>139</sup> See, e.g., *id.* § 16-7-21.

<sup>140</sup> See, e.g., S.C. CODE ANN. § 16-11-770 (West 2018).

<sup>141</sup> See, e.g., MO. ANN. STAT. § 569.095 (West 2017) (naming tampering with computer data misdemeanor unless offender intended to steal \$750 or more).

<sup>142</sup> See, e.g., S.C. CODE ANN. § 16-13-135.

<sup>143</sup> HOCHHEIMER, *supra* note 61, at 23 (providing list of common law misdemeanor offenses).

<sup>144</sup> See *supra* notes 116-42 (listing misdemeanors).

jurisdictions have added thousands of new misdemeanor offenses to the books.<sup>145</sup> For example, Illinois has over four hundred separate misdemeanor offenses.<sup>146</sup> Massachusetts has roughly five hundred misdemeanor offenses.<sup>147</sup> At the federal level, the numbers are even more staggering, with potentially more than three thousand separate offenses classified as misdemeanors.<sup>148</sup> Research shows that misdemeanors comprise a significant portion of new criminal offenses. For example, in North Carolina between 2008 and 2013, as many as 105 (out of 206 total) new misdemeanors were codified at an average rate of 17.5 misdemeanor offenses added to the criminal code each year.<sup>149</sup>

There has been a growth in the number of misdemeanors and felonies, some being much less serious in nature than they were historically.<sup>150</sup> Additionally, many crimes that were historically misdemeanors are now considered felonies.<sup>151</sup> Some examples include forgery<sup>152</sup> and kidnapping.<sup>153</sup> Many crimes that never existed—like traffic offenses—are now misdemeanors.<sup>154</sup> The line between misdemeanors and felonies is less apparent. Though carrying vastly different risks, use of a metal detector in a national forest and assault are both

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<sup>145</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513-15 (2001).

<sup>146</sup> *Id.* at 513-14.

<sup>147</sup> *Id.* at 514.

<sup>148</sup> *Id.* at 505 n.32. Scholars have written numerous articles on the swell of codified crimes, asserting that the United States is contending with an issue of “overcriminalization.” See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809 (2005).

<sup>149</sup> Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1941-42 (2014).

<sup>150</sup> Gregory Jones, *Over-Criminalization and the Need for a Crime Paradigm*, 66 RUTGERS L. REV. 931, 934, 948 (2014) (“[W]e have too many crimes; and as a result, the corpus of acts that constitute crimes is so massive and its constituent parts often so attenuated from our traditional understanding of crimes that any continued credence of the ancient maxim ‘ignorance of the law is no excuse’ is a farce.”); Luna, *supra* note 148, at 746 (“Both federal and state governments have contributed over the past quarter century to a punishment binge of unprecedented size and scope.”); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) (discussing how advent of “regulatory offenses” particularly has contributed to overcriminalization issue); Stuntz, *supra* note 145, at 615 (citing number of contemporary state criminal statutes, including ones that criminalize frightening pigeons from certain areas (Massachusetts), “selling untested sprinklers” (Florida), and making “homosexual propositions” (Ohio)).

<sup>151</sup> See *supra* Part I (discussing historical shift of misdemeanors becoming felonies).

<sup>152</sup> See, e.g., OKLA. STAT. tit. 21, § 1621 (2018) (codifying first degree forgery as felony).

<sup>153</sup> See, e.g., COLO. REV. STAT. § 18-3-302 (West 2018) (codifying kidnapping and second-degree kidnapping as felonies); 720 ILL. COMP. STAT. ANN. 5/10-2 (West 2018) (same); KAN. STAT. ANN. § 21-5408 (West 2017) (same).

<sup>154</sup> See, e.g., KAN. STAT. ANN. § 8-2116.

misdeemeanors eligible for similar penalties—the first a federal misdemeanor and the second a state misdemeanor.<sup>155</sup> Similarly, flushing drugs down a toilet can constitute a felony. If an individual is under federal investigation for drug possession, a prosecutor could charge an individual with felony obstruction of justice.<sup>156</sup>

The line between felonies and misdemeanors has also blurred due to their consequences. Assault with a deadly weapon is a felony in many states,<sup>157</sup> but the judge may decide to downgrade the offense to a misdemeanor at sentencing, thereby exposing the defendant to a sentence of less than a year.<sup>158</sup> Tossing a broken bottle at a friend in a bar does not sound too serious, but—in New York, for example—it can quickly turn into felony assault.<sup>159</sup> And a theft of \$1000 or less is often a misdemeanor, but make that \$1050 and in many jurisdictions that could be a felony.<sup>160</sup> But even if a hungry student shoplifts from the local grocery store with a value of \$35, she can still be charged with felony theft if it is her third offense.<sup>161</sup> Gun charges are a prime example of misdemeanors that become felonies because of a defendant's criminal history. Carrying a gun without a license is legal in some states, a misdemeanor in others, and, if you already have a felony record, a felony under federal law that carries a minimum of five years.<sup>162</sup> As demonstrated above, a misdemeanor offense can become a felony in certain circumstances and especially if it has occurred several times or if the defendant has a criminal record. However, misdemeanors have overall been, and are still, less serious crimes than felony offenses.

This Part has provided a brief snapshot into the historic shift in the definition of misdemeanors from the common law to today. While it does not in any way provide an exhaustive history of misdemeanor crimes or an empirical understanding of the changes to misdemeanors, it does teach a few important

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<sup>155</sup> See 16 U.S.C. § 551 (2012) (granting Secretary of Agriculture authority to “make provisions for the protection against destruction by fire and depredations upon the public forests and national forests” and providing that “any violation of . . . such rules and regulations shall be punished by a fine . . . or by imprisonment for not more than six months, or both”); NEV. ADMIN. CODE 407.103 (2017) (“[N]o person may use a metal detector in the park.”); UTAH CODE ANN. § 76-5-102 (West 2017) (assault).

<sup>156</sup> 18 U.S.C. § 1512(c) (2012) (criminalizing obstruction of justice generally).

<sup>157</sup> See, e.g., CAL. PENAL CODE § 245 (West 2018).

<sup>158</sup> See *People v. Lee*, 224 Cal. Rptr. 3d 706, 710 (Cal. App. Ct. 2017) (holding that trial court has discretion to sentence some felonies as misdemeanors).

<sup>159</sup> N.Y. PENAL LAW § 120.05 (McKinney 2018) (“A person is guilty of assault in the second degree when . . . [h]e recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument. . . . Assault in the second degree is a class D felony.”); see also ALA. CODE § 13A-6-21 (2018) (same).

<sup>160</sup> N.Y. PENAL LAW §§ 155.25, 155.05 (McKinney 2018).

<sup>161</sup> FLA. STAT. ANN. § 812.014 (West 2017).

<sup>162</sup> See 18 U.S.C. § 922(g) (2012); *Open Carry*, GIFFORDS LAW CENTER: TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/guns-in-public/open-carry/> [<http://perma.cc/6JJY-KY6U>] (last visited Apr. 28, 2018) (surveying state gun laws).

points. One is that the number of crimes have proliferated,<sup>163</sup> such that there are exponentially more misdemeanors on the books today than in common law England. Where historically there were a handful of misdemeanors (and felonies), now there are hundreds. Second, many formerly serious misdemeanors have become felonies. For example, kidnapping,<sup>164</sup> counterfeiting, and forgery<sup>165</sup> were formerly misdemeanors,<sup>166</sup> but they are now felonies. Although this could use further study, it is not unreasonable to assume that this sheer increase in the numbers of misdemeanor crimes has had an impact on overcrowding of courts trying to process all of these new crimes. If these individuals are not able to obtain release before trial, this impacts bail and contributes to increases in jail population numbers.

The next Part explores how the common law and modern statutes address misdemeanor bail. Historically, even the most serious misdemeanors came with important constitutional protections—like release before trial.

## II. HISTORIC VIEW OF MISDEMEANOR BAIL

Misdemeanors were not punished before trial under the common law. The law did not allow detention before trial based on due process principles.<sup>167</sup> This was especially true when defendants were charged with noncapital crimes.<sup>168</sup> When individuals were charged with noncapital crimes—including misdemeanors—they had the right to release.<sup>169</sup> Capital crimes under the English common law were significant felonies, like murder, arson, and serious theft, and would not allow release where there was strong evidence against the defendant. And all misdemeanors were noncapital crimes; therefore, there was no imprisonment before trial when people were charged with misdemeanors.

A form of misdemeanor bail has existed since very early in the medieval justice system of English common law. From the beginning, the purpose of bail was to ensure that a defendant would return for her court appearance. Those charged with misdemeanors were guaranteed bail.<sup>170</sup> And individuals did not pay in order to be released before trial, as it was a guaranteed right for minor crimes. As time went on, misdemeanors were used as a form of economic and

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<sup>163</sup> Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648 (2006) ("[L]aws susceptible to criminal sanction *cannot even be counted*").

<sup>164</sup> See, e.g., COLO. REV. STAT. § 18-3-302 (West 2018); 720 ILL. COMP. STAT. ANN. 5/10-2 (West 2018); KAN. STAT. ANN. § 21-3420 (West 2017).

<sup>165</sup> See, e.g., 18 U.S.C. § 471 (providing that counterfeiting or forging "any obligation or other security of the United States" is felony).

<sup>166</sup> See HOCHHEIMER, *supra* note 61, at 23 (noting that, at common law, misdemeanors included "counterfeiting and forgery . . . [and] kidnapping").

<sup>167</sup> See BLACKSTONE, *supra* note 59, at \*1001.

<sup>168</sup> See *id.* at \*1002.

<sup>169</sup> See *id.* at \*1001-02.

<sup>170</sup> See *infra* note 177 and accompanying text.

social control over African Americans in the South and other parts of the country. Vagrancy laws were abused in this regard—African Americans were charged with misdemeanors, convicted quickly, and leased to work farms rather than jails. Today, while there is no official use of misdemeanors to control minorities, some would argue that our money bail system has a similar effect because people charged with misdemeanors are no longer guaranteed release if defendants cannot afford bail.<sup>171</sup>

A. *Misdemeanor Bail Under the Common Law*

Various tenets of English common law required a defendant's release pending trial, including in some capital cases, based on the principle of the presumption of innocence.<sup>172</sup> Essentially all noncapital offenses were bailable under the old English common law.<sup>173</sup> Eventually, it became the norm for courts to have broad discretion in providing and fixing bail,<sup>174</sup> and into the late 1200s and for the next five hundred years, denying bail in murder cases became the standard,<sup>175</sup> even though sometimes courts did set bail in murder and other felony cases.<sup>176</sup> For misdemeanors, in most cases, bail was still provided "as of right," not to be subject to the discretion of the court, even when the defendant was considered guilty of the crime.<sup>177</sup> By common law and statute,<sup>178</sup> bail was only available for

<sup>171</sup> See *infra* Part III. For a broader discussion of the racial impacts of bail, see BAUGHMAN, *supra* note 5, at 93-107.

<sup>172</sup> THOMAS WONTNER, OLD BAILEY EXPERIENCE: CRIMINAL JURISPRUDENCE AND THE ACTUAL WORKING OF OUR PENAL CODE OF LAWS 263 (1833) (referring to presumption of innocence as assumption of innocence).

<sup>173</sup> JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 154 (Boston, Little, Brown & Co. 3d ed. 1880).

<sup>174</sup> *Id.* at 154-55.

<sup>175</sup> Statute of Westminster, 1275, 3 Edw. 1, c. 15 (Eng.); BLACKSTONE, *supra* note 59, at \*298 ("By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute . . ."); ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, at 59 (1940) (noting that bail was not provided in homicide cases); see also 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 234 (London, MacMillan & Co. 1883) (commenting that Statute of Westminster established law on bail for five hundred fifty years in England).

<sup>176</sup> BISHOP, *supra* note 173, at 154-55.

<sup>177</sup> *Id.* at 155-57 ("One held to answer for a misdemeanor may give bail equally whether he is guilty or not."); see also JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 96 (Brookfield, E. Merriam & Co. 2d ed. 1832) ("[S]mall misdemeanors, or any offense below felony, must be bailed unless they be excluded from it by some special act of parliament."); JOHN WILDER MAY, THE LAW OF CRIMES 73 (Boston, Little, Brown & Co. 2d ed. 1893) ("Every prisoner must at common law be allowed bail upon a commitment, unless he is charged with a capital crime.").

<sup>178</sup> By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. I, 3 Edw. I., ch. 15, takes away

“inferior crimes”<sup>179</sup>—not necessarily for capital crimes.<sup>180</sup> Capital crimes,<sup>181</sup> such as homicide and counterfeiting the king’s seal, required that defendants be “instantly taken, and their bodies kept safely in prison.”<sup>182</sup>

In general, bail was not allowed for crimes where “imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*. . . . [I]n such cases bail is . . . taken away wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less.”<sup>183</sup> And so felonies were treated differently than misdemeanors under the common law, and those charged with felonies had fewer rights. At common law, denying bail in felony cases was justified as a means of protecting the public based on the often violent and serious nature of the crime.<sup>184</sup> But misdemeanors, such as kidnapping or battery, were bailable.<sup>185</sup> Though there was no specific *absolute* right to bail in misdemeanor cases, the general rule and practice was that those charged with anything other than a capital crime were released on bail, unless there was strong evidence that the defendant would flee the jurisdiction.<sup>186</sup> The probable guilt of

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the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI., ch. 9, and I & 2 Ph. & Mar. ch. 13, give further regulations in this matter; and upon the whole we may collect, that no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter if the prisoner be clearly the slayer and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Persons outlawed: 6. Such as have abjured the realm: 7. Persons charged with arson. Others are of a dubious nature; as, 8. Thieves openly defamed and known: 9. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and 10. Accessories to felony, that labor under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not.

BLACKSTONE, *supra* note 59, at \*1002-03.

<sup>179</sup> *Id.* at \*1001.

<sup>180</sup> [T]he party accused, is, as we have observed, usually attached by safe and secure Pledges; or, if he cannot produce any pledges, he shall be cast into prison. But, in all Pleas of Felony, the Accused is generally dismissed on pledges, except in a Plea of Homicide, where, for the sake of striking terror, it is otherwise enacted.

A TRANSLATION OF GLANVILLE, *supra* note 88, at 280-81.

<sup>181</sup> Capital crimes under the English common law were serious felonies, such as murder, arson, and rape. *See* HOCHHEIMER, *supra* note 61, at 22-23.

<sup>182</sup> 2 FRANCIS MORGAN NICHOLS, BRITTON: THE FRENCH TEXT CAREFULLY REVISED WITH AN ENGLISH TRANSLATION INTRODUCTION AND NOTES 25 (Francis Morgan Nichols, trans., The Lawbook Exchange, Ltd. 2003).

<sup>183</sup> BLACKSTONE, *supra* note 59, at \*1002.

<sup>184</sup> *Id.*

<sup>185</sup> HOCHHEIMER, *supra* note 61, at 23 (noting that misdemeanors included “assault and battery . . . [and] kidnapping”); *The Law Respecting Bail*, 6 IRISH L. TIMES & SOLIC. J. 404, 404 (1873) (“We have shown that by common statute law every misdemeanor was bailable, as it ought to be.”).

<sup>186</sup> *See* BISHOP, *supra* note 173, at 153.



the defendant could be considered in determining the amount of bail.<sup>187</sup> These restrictions, however, did not stop defendants from obtaining release. As Blackstone explained, a person who was arrested could be released with bail—or a security for his appearance paid by sureties that were returned when the defendant appeared.<sup>188</sup>

Besides the right to release, misdemeanor defendants enjoyed other procedural rights that indicated that their crimes were less serious than felonies. For example, warrantless arrests for misdemeanor offenses were not allowed, except for when the misdemeanor included a breach of peace.<sup>189</sup> Also, at trial, a misdemeanor offender did not necessarily have to be present, unlike in felony cases.<sup>190</sup> Misdemeanor defendants enjoyed more rights due to their alleged crimes being less serious than felony offenses.

Various methods were employed to guarantee the appearance of misdemeanants before money bail. In the Domesday Book, landowners were “answerable to a certain extent for the misdeeds of their free retainers” and were expected to produce their “free ‘loaf eater[s]’” for court appearances.<sup>191</sup> Early

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<sup>187</sup> *Id.* at 155.

<sup>188</sup> When the defendant is . . . arrested, he must either go to prison, for safe custody: or put in *special bail* to the sheriff. For, the intent to arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail* (from the French word *bailer*, to deliver), because the defendant is bailed, or delivered, to his sureties, upon their giving security for his appearance: and is supposed to continue in their friendly custody instead of going to jail.

BLACKSTONE, *supra* note 59, at \*767. Blackstone continues this excellent explanation of early bail systems, writing:

The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, (. . . real, substantial, responsible bondsmen), to insure the defendant's appearance at the return of the writ; which obligation is called the *bail-bond*. The sheriff, if he pleases, may let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forth-coming in court; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Hen. VI., ch. 10, to take (if it be tendered) a sufficient bail-bond: and by statute 12 Geo. I., ch. 29, the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and endorsed on the back of the writ. . . . These bail, who must at least be two in number, must enter into a recognizance in court or before the judge or commissioner, in a sum equal (or in some cases double) to that which the plaintiff hath sworn to; whereby they do jointly and severally undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him. . . . Special bail may be discharged, by surrendering the defendant into custody, within the time allowed by law; for which purpose they are at all times entitled to a warrant to apprehend him.

*Id.* at \*767-68.

<sup>189</sup> CLARK, JR., *supra* note 103, at 35; *see also* ELIJAH N. ZOLINE, 1 FEDERAL CRIMINAL LAW AND PROCEDURE 26, 30 (Boston, Little, Brown & Co. 1921).

<sup>190</sup> ZOLINE, *supra* note 189, at 26, 30.

<sup>191</sup> FREDERIC WILLIAM MAITLAND, DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND 29 (1921).

courts employed a system known as mainprise, or pledge. Mainprise<sup>192</sup> was a writ directing the sheriff to take sureties for a prisoner's court appearance by allowing one individual to "make[] himself responsible for the appearance of another."<sup>193</sup> These "mainperners" were more often than not trusted members of the accused individual's household or community. In fact, to detain a prisoner who was eligible for mainprise—an individual who was bailable because he was deliverable to court by the word of other men—was considered misconduct for which a sheriff could be investigated.<sup>194</sup> It was almost viewed as a community duty to return people accused of crimes to court.<sup>195</sup> Thus, it was frowned upon for a person to be detained pretrial when they had the right to bail.

Because pretrial release was the norm, some early statutes even made refusing bail to a bailable person an offense.<sup>196</sup> Westminster I, issued in 1275 during the reign of Edward I, detailed which prisoners were eligible for mainprise and which were not, and listed an accompanying penalty for unlawful bailment.<sup>197</sup> It stated:

And if any hold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King . . . and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner and also shall be in the great mercy of the King.<sup>198</sup>

Reasonable bail has also been required historically. The warning that reasonable bail must be honored has been codified since the Magna Carta. The Magna Carta provides:

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his

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<sup>192</sup> "Mainprise" comes from the French word for member of a household. NICHOLS, *supra* note 182, at 377.

<sup>193</sup> *Id.*

<sup>194</sup> See Statute of Westminster I 1275, 3 Edw. c. 15 § 5 (Eng.) (stating punishment for sheriff for unlawfully detaining bailable persons).

<sup>195</sup> NICHOLS, *supra* note 182, at 48-49. Laws mandated a sort of communal responsibility for court appearances, requiring every common adult male to belong to a "tithing and pledged by their tithingmen . . . and let the obligation of the pledge be this, that if they do not produce those for whom they are pledged, to be amenable to justice in our Court." *Id.* at 49.

<sup>196</sup> Blackstone lists the following statutes protecting this right to bail: "Westm. I, 3 Edw. I., ch. 15, [] the *habeas corpus* act, 31 Car. II., ch. 2[,] . . . [and] I W. & M. stat. 2, ch.1." BLACKSTONE, *supra* note 59, at \*1001.

<sup>197</sup> Statute of Westminster I 1275, 3 Edw. c. 15 § 5 (Eng.).

<sup>198</sup> *Id.* §§ 7-8.

'contentment'; and a merchant in the same way, saving his 'merchandise'; and a villein shall be amerced,<sup>199</sup> in the same way, saving his 'wainage.'<sup>200</sup>

In other words, the Magna Carta guaranteed that an individual would not be punished for a minor offense.

Finally, by the time of the Glorious Revolution, the warning against government officials violating the rights ofailable defendants was serious enough to be included as damning evidence against King James II. The English Bill of Rights of 1689, an agreement between Parliament and William and Mary, listed bail abuse as one of the thirteen laws and liberties of the kingdom that were "subverted" by James II's "evil" men.<sup>201</sup>

The right prohibited as bail abuse in the English Bill of Rights of 1689 was excessive bail. It charged that "excessive Baile hath beene required of Persons committed in Criminal cases, to elude the Benefitt of the Lawes made for the Liberty of the Subjects."<sup>202</sup> This violation of defendants' rights led to the language in the pronouncements of the English Bill of Rights and our own Eighth Amendment declaring that excessive bail ought not be required.<sup>203</sup> Medieval statutes also warned against the danger of excessive bail for misdemeanors. Blackstone noted that even these early statutes saw excessive bail as a violation of habeas corpus, writing: "And, lest this [habeas corpus] act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required."<sup>204</sup> A detainee had a right to "bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just."<sup>205</sup> It was an important constitutional requirement early on that bail be reasonable, particularly for misdemeanors.

Misdemeanors generally did not come with any deprivation of liberty. And defendants were forgiven for missing court dates even a few times for misdemeanor offenses. Foremost in the use of misdemeanor bail from the beginning was the "great importance to the public [of] the preservation of . . . personal liberty."<sup>206</sup> Blackstone theorized that if power existed to "imprison arbitrarily whomever . . . officers thought proper . . . there would soon be an end of all other rights and immunities."<sup>207</sup> Because unlawful imprisonment occurred

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<sup>199</sup> To be in mercy, or "amercement," to the king meant to owe the king a fine. MAGNA CARTA ch. 20.

<sup>200</sup> *Id.*

<sup>201</sup> Bill of Rights 1688, 1 W. & M. 2 c. 1 (Eng.).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* § 2; *see also* U.S. CONST. amend. VIII.

<sup>204</sup> BLACKSTONE, *supra* note 59, at \*75.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

behind closed doors, Blackstone viewed it as more dangerous than despotism.<sup>208</sup> To protect this “relief of the subject against malicious imprisonment upon slight accusations,” statutes were enacted to empower justices to grant bail as early as the reign of Richard III.<sup>209</sup> In fact, in the time of Henry II, much leeway was given for missed court appearances for things like illness or even attending the public fair.<sup>210</sup> It was only upon failure to appear at the third summons that the accused’s “body shall be taken, and his Pledges shall be amerced.”<sup>211</sup> The key before trial was liberty and release for misdemeanor defendants, even after failures to appear.

Even when courts moved toward a preliminary bail hearing, it was clear that the issue was how to release a defendant—not whether he was to be released. The goal was not to hinder bail:

English bail law presumed that defendants would be released and discussed the ‘bail decision’ as though it were a decision of *how* to release the defendant, not *if* he would be released. To deny bail to a person who is later determined to be innocent was thought to be far worse than the smaller risk posed to the public by releasing the accused.<sup>212</sup>

A form of preliminary bail hearing for misdemeanors developed to ensure that bail was not given out too freely, was codified by the 1550s.<sup>213</sup>

Overall, misdemeanor bail was respected historically as a constitutional right. As the right to bail for capital offenses was historically limited, so there is some argument that those serious violent crimes should have limited bail today. But there is no similar historical argument for misdemeanors. The right to bail for misdemeanors was largely inseparable from the principle of the presumption of innocence.<sup>214</sup> In fact, Blackstone viewed denying bail for a misdemeanor as particularly egregious, labeling it an “offence against the liberty of the

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<sup>208</sup> *Id.* (“[C]onfinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government [than more public displays of despotism].”).

<sup>209</sup> JOHN REEVES, 5 REEVES’ HISTORY OF THE ENGLISH LAW: FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 118 (W.F. Finlason ed., M. Murphy 1880).

<sup>210</sup> A TRANSLATION OF GLANVILLE, *supra* note 88, at 10, 14, 24 n.1.

<sup>211</sup> *Id.* at 28.

<sup>212</sup> Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 729 (2011).

<sup>213</sup> This statute

confirmed that bail should not be granted by a single justice, or two acting at different times, but only by two acting together, and then not before they . . . had taken ‘the examination of the prisoner, and information of them that bring him, of the fact and circumstances thereof . . . .’

BAKER, *supra* note 69, at 515 n.50, 515-16.

<sup>214</sup> Baradaran, *supra* note 212, at 734 (noting that historically, presumption of innocence protected accused individuals from imprisonment much like right to bail did).

subject.”<sup>215</sup> Thus, when individuals were charged with noncapital crimes, which were misdemeanors, they had the right to release. The law did not allow any punishment before trial,<sup>216</sup> and cases specifically explained that incarceration before trial was prohibited.<sup>217</sup> Consequently, detention played a limited role before trial. The role of bail was to ensure the charged defendant would appear for trial,<sup>218</sup> though historically courts sometimes allowed defendants several failures to appear before rearrest.<sup>219</sup> Bail was largely assumed because innocence was assumed.<sup>220</sup> As the law developed, however, the use of bail changed from being a general right—particularly for misdemeanor crimes—to something that discriminates between defendants based on ability to pay bail.

#### B. Misdemeanors After the Civil War

Misdemeanors and other low-level crimes played an important role in oppressing African Americans in the South. Not only were African Americans denied release before trial, but they were sent to farms or other places to work

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<sup>215</sup> BLACKSTONE, *supra* note 59, at \*1001.

<sup>216</sup> See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 552 (1898). See generally François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 112 (2010).

<sup>217</sup> See *Ex parte Verden*, 237 S.W. 734, 737 (Mo. 1922) (“Confinement in jail prior to trial is not authorized because defendant may eventually be convicted of the charge by a jury, or as any part of his punishment, if guilty, but to assure his presence when the case is called for trial and during the progress thereof. The *only theory* on which bail can be denied in any capital case is that the proof is so strong as to indicate the probability that defendant will flee if he has the opportunity, rather than face the verdict of a jury.” (emphasis added)).

<sup>218</sup> See T.W. HUGHES, A TREATISE ON CRIMINAL LAW AND PROCEDURE 610 (1919); see also *Hudson v. Parker*, 156 U.S. 277, 285 (1895) (finding that sole purpose of bail is to compel defendant to show up for trial); *Hunt v. Roth*, 648 F.2d 1148, 1163 (8th Cir. 1981) (“The federal courts have traditionally held . . . that under the eighth amendment and the federal bail statute, the only relevant factor is the likelihood that the defendant will appear for trial.”); *Barret v. Lewis*, 1 Mart. (o.s.) 189, 192 (La. 1810) (“Bail is required in this territory for the purpose of securing the plaintiff from the flight of the defendant and for no other purpose. It is the same in England.”); *People v. Van Horne*, 8 Barb. 158, 167 (N.Y. Gen. Term 1850) (“For as I have already stated, the object of imprisonment before trial is not the punishment of the delinquent, but merely to secure his appearance in court when his trial is to be had.”); *Hampton v. State*, 42 Ohio St. 401, 404 (1884) (“The object of bail is to secure the appearance of the one arrested when his personal presence is needed; and, consistently with this, to allow to the accused proper freedom and opportunity to prepare his defense. The punishment should be after the sentence.”).

<sup>219</sup> See *supra* note 211 and accompanying text.

<sup>220</sup> See *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (explaining that defendant is entitled to pretrial release until proven guilty as spirit of bail is to “enable [defendants] to stay out of jail until a trial has found them guilty”); *Hunt*, 648 F.2d at 1156 (“The protection against excessive bail has a direct nexus to the presumption of innocence, implicitly recognized within the fourteenth amendment.”).

after being charged with minor crimes.<sup>221</sup> Officially, the Thirteenth Amendment to the U.S. Constitution prohibited owning another person as property, but the practice of forced servitude was perpetuated through the criminal justice system.<sup>222</sup> The South heavily relied on slave labor before the Civil War and, according to some scholars, slave labor was key to its later economic and industrial success.<sup>223</sup> A so-called “leasing system” was the new answer to getting around the Thirteenth Amendment and capitalizing on African-American labor.<sup>224</sup> Specifically, the southern criminal justice system essentially recommodified to fulfill the demands of industrialization and racial animus by funneling newly freed slaves into this leasing system,<sup>225</sup> which allowed the state to make money by “selling the rights to prisoners,”<sup>226</sup> specifically criminally convicted African-American men, to private corporations to work in labor camps under conditions “torturous by modern sensibilities.”<sup>227</sup>

The leasing system not only created a means for private corporations to receive cheap labor, it introduced a new method for local officials to obtain additional capital.<sup>228</sup> The local sheriff had a financial motivation to make as many arrests as possible.<sup>229</sup> Indeed, in some counties, the criminal justice system started to look more like a slave labor industry than a government institution meant to hand down justice.<sup>230</sup> African Americans were made to serve labor sentences because they had no money and private entities reaped the rewards.<sup>231</sup> This system is reminiscent of the money-bail system that is thriving today in most U.S. jurisdictions, where because many defendants cannot pay they must serve jail time while those with money are freed.<sup>232</sup>

The economic incentives introduced into the criminal justice system at the expense of African Americans dramatically increased the number of arrests and convictions in the southern counties. Immediately after the Civil War, “true crime was almost trivial in most places” and cheaply resolved.<sup>233</sup> Most cases consisted of minor offenses, which were resolved by compelling the defendant to compensate the injured party rather than serve jail time, especially since there

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<sup>221</sup> DOUGHLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 53-54 (2008).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 47, 51.

<sup>224</sup> *Id.* at 66.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 54.

<sup>227</sup> *Id.* at 50.

<sup>228</sup> *Id.* at 65.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 66.

<sup>232</sup> See BAUGHMAN, *supra* note 5, at 48.

<sup>233</sup> BLACKMON, *supra* note 221, at 69.

was a need to keep every man to staff farms.<sup>234</sup> The leasing system dramatically changed this; by 1877, “every formally Confederate state except Virginia had adopted the practice of leasing black prisoners into commercial hands.”<sup>235</sup> Hundreds of African-American men were being leased out to railroad companies, cotton planters, and coal companies, sometimes for years at a time.<sup>236</sup> The criminal justice system became more crowded as African Americans were syphoned into the leasing system to meet commercial needs: “Arrests surged and fell, not as acts of crime increased or receded, but in tandem to the carrying needs of the buyers of labor.”<sup>237</sup>

Low-level crimes, such as misdemeanor vagrancy and the like, played an important role in this leasing system. Though even state governments participated in the leasing system,<sup>238</sup> it was important for the local counties to convict these African-American men of low-level crimes because a conviction for a more serious crime forced the defendant into the control of the state criminal justice system,<sup>239</sup> restricting the county sheriff from selling her to a private corporation and making a profit.<sup>240</sup> As a result, multiple counties in Alabama chose to charge men accused of felonies with misdemeanors instead, which led to the number of county prisoners dramatically exceeding that of state prison.<sup>241</sup> Additionally, almost every southern state criminalized “vagrancy” in such loose terms that “virtually any freed slave not under the protection of a white man could be arrested for the crime.”<sup>242</sup>

Officers of the law, including police and justices of the peace, were compensated through a fee system paid by those who used the court system.<sup>243</sup> Each act performed by the officer had a cost and the accumulated total was paid off at the resolution of a case, along with any penalties the judge ordered.<sup>244</sup> Most African Americans did not have the currency to pay fines or bail.<sup>245</sup> Moreover, forced labor began to be used as a form of currency to pay off the debts racked up while going through the criminal justice system.<sup>246</sup> Thus, once

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<sup>234</sup> *Id.* at 62-63 (“The county was interested in neither rehabilitation nor long-term punishment, particularly in an era when every man was needed to staff the farms and enterprises of the county.”).

<sup>235</sup> *Id.* at 56.

<sup>236</sup> *Id.* at 54-57.

<sup>237</sup> *Id.* at 65-66.

<sup>238</sup> *Id.* at 54.

<sup>239</sup> *Id.* at 63.

<sup>240</sup> *Id.* at 63-64 (describing system in which justice of peace would pay prisoner’s judgment on old debts, then force mortgage for that amount upon prisoner).

<sup>241</sup> *Id.* at 65.

<sup>242</sup> *Id.* at 53.

<sup>243</sup> *Id.* at 62.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 66.

<sup>246</sup> *Id.* at 64-67.

an African-American defendant was in the criminal justice system, it was difficult to get out, regardless of whether he was guilty or not.<sup>247</sup> And the system worked efficiently: the timespan from arrest to conviction and delivery at a slave mine or mill was often not more than seventy-two hours.<sup>248</sup>

By the end of World War I, the practice of leasing criminal convicts started to be criticized by the public and also became less lucrative.<sup>249</sup> New technologies decreased reliance on manual labor, cotton prices plummeted after World War I, and the cost of convict labor started to become too expensive.<sup>250</sup> A few key changes eventually ended criminal leasing of African Americans in the 1950s.<sup>251</sup>

However, misdemeanor offenses continued to be used to oppress African Americans, albeit in a subtler fashion. Particularly in the South, vagrancy and loitering laws continued to serve as a means to control unpopular groups, in large part because of how vague they were, permitting the police to exercise almost limitless discretion in enforcing these laws.<sup>252</sup> Through vagrancy laws, the police could limit the movement of African Americans and other members of society.<sup>253</sup> All the while, these misdemeanor statutes kept African Americans under the control of the criminal justice system. Defendants did not have money

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<sup>247</sup> *Id.* at 66-67.

<sup>248</sup> *Id.* at 66. Some white landowners began harnessing the leasing system to force African-American tenants into servitude. *Id.* These farmers would “advance[] money to black tenants at the beginning of the crop season.” *Id.* When the tenants failed to pay, instead of evicting them, the farmers “sw[ore] out criminal warrants accusing them of fraud.” *Id.* Afraid to be entered into the leasing system, black defendants would accept the “white landlords . . . as their sureties” and, usually, “confess[] . . . responsibility before being tried.” Thereafter, the judge “accepted payment and forfeiture of a bond from the white surety, rather than render a verdict on the alleged crime,” and the tenant would contract to work for the white landlord without pay for as long as it took to pay off the debt. *Id.* at 67. Once an African-American man entered this agreement, he could be held “almost indefinitely” as white landlords frequently tacked on more debt, claiming that it was incurred providing for his care. *Id.*

<sup>249</sup> *Id.* at 365-67.

<sup>250</sup> *Id.* at 365-70. Yet the financial incentive to arrest and convict as many African-American men as possible remained even through the 1920s, and more African-American convicts than ever were placed in the leasing system by 1930. *Id.* at 367.

<sup>251</sup> Federal courts held that a *peonage* charge could be prosecuted without showing that “a debt between the slave and slave driver existed,” essentially eliminating the “standard defense” against the charge. *Id.* at 380. Additional anti-slavery laws were passed and reworked in the late 1940s, including the rewriting of the criminal code, to target forced servitude more specifically and after World War II, the abhorrent practice of leasing convicted African-American men was largely and finally put to rest. *Id.* at 381.

<sup>252</sup> RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 120 (2016).

<sup>253</sup> *Id.* Law enforcement used these laws to impede civil rights demonstrations and even to eject civil rights activists from cities. *Id.* at 122-23. These laws were also used as a form of “social control,” permitting law enforcement to target interracial association and couples. *Id.* at 307-08.



to hire lawyers or make bail so they would often serve jail time for violating vague misdemeanor laws once their labor was no longer leased.<sup>254</sup>

Overall, African Americans suffered under criminal leasing systems in the South and vagrancy laws throughout the country, both of which increased the control the criminal justice system had over them. With minor criminal charges, they were forced into servitude or served jail time without money to pay county fines (and later bail). The increased numbers of African Americans entering the criminal justice system during these years has had continuing impacts today.<sup>255</sup>

The next Section discusses the evolution of misdemeanor bail more specifically, from the early years to the present day.

### C. *Misdemeanor Bail in Recent Years*

Early U.S. common law soon became consistent with English common law in guaranteeing bail for minor offenses. In the colonies early on, bail was highly variable due to “arbitrary” rulemaking and differing local rules.<sup>256</sup> However, through the Judiciary Act of 1789, the federal government established that non-capital crimes should be bailable, while in capital cases the courts had the discretion to decide whether to fix bail.<sup>257</sup> As the law evolved into the 1900s, federal and state courts continued to require pretrial release for criminal defendants except for charges of a capital offense where the court would have the discretion to deny bail.<sup>258</sup> Early on in America, in the majority of cases it was assumed bail would be granted.<sup>259</sup> Moreover, for the sake of ensuring the

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<sup>254</sup> *Id.* at 91. Sometimes local officials engaged in a practice called “filing away charges” against a defendant. *Id.* at 91. This “filing away” of a charge was “less than conviction but short of dismissal” and “left the defendant vulnerable to future prosecution” while “preclud[ing] malicious prosecution suits.” *Id.* Fortunately, vagrancy laws have largely been invalidated. *Id.* at 339; *see also* *Papachristou v. City of Jackson*, 405 U.S. 156, 171 (1972) (ruling Jacksonville vagrancy ordinance unconstitutional).

<sup>255</sup> *See* BAUGHMAN, *supra* note 5, at 106 (stating that “blacks are arrested and spend time in pretrial detention more than whites”).

<sup>256</sup> J.D. WHEELER, 2 AMERICAN COMMON LAW 52 (New York, Treadway & Atwood 1834).

<sup>257</sup> Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

<sup>258</sup> *See* THE OXFORD COMPANION TO AMERICAN LAW 305 (Kermit L. Hall et al. eds., 2002) (remarking that several felonies at common law were considered capital offenses; however, defendant could plea “benefit of clergy” to escape death sentence).

<sup>259</sup> *See, e.g., Hudson v. Parker*, 156 U.S. 277, 285 (1895) (“The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.”); *United States v. Barber*, 140 U.S. 164, 167 (1891) (“But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial . . . Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail . . .”); *People v. Tinder*, 19 Cal. 539, 542 (1862) (“In all other cases, [except for capital cases] the admission to bail is a right which the accused can claim, and which no Judge or

presumption of innocence, courts were largely prohibited from considering the weight of the evidence against a defendant,<sup>260</sup> and bail was fixed based on the defendant's individual circumstances.<sup>261</sup> This changed slightly with the introduction of Rule 46 of the Federal Rules of Criminal Procedure in 1944, which allows courts to fix bail based on the weight of evidence and several other factors.<sup>262</sup> This change in memorializing limits on bail eventually had lasting impacts on misdemeanor bail cases.

More radical changes in how bail was handled occurred toward the end of the 1960s, particularly with the passage of the Federal Bail Reform Act in 1966.<sup>263</sup> By then, courts had begun to limit granting bail, making determinations based on such factors as the weight of evidence against the defendant and the danger the defendant posed to the community.<sup>264</sup> The Federal Bail Reform Act essentially increased the number of factors judges could consider when determining whether to grant bail.<sup>265</sup> However, the overall impact of the Act, though initially favorable, ultimately contributed to the corrosion of the long-standing principle of the presumption of innocence.<sup>266</sup>

The presumption of innocence, which has historically informed the rationale behind the right to bail in noncapital cases, became largely divorced from the

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Court can properly refuse.”); *People v. Van Horne*, 8 Barb. 158, 167 (N.Y. Sup. Ct. 1850) (“Until his guilt is legally ascertained, there is no ground for punishment, and it would be cruel and unjust to inflict it.” (citation omitted)).

<sup>260</sup> See *Coffin v. United States*, 156 U.S. 432, 452 (1895); see also *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (noting purpose of bail, consistent with presumption of innocence, is to “enable the[] [defendant] to stay out of jail until a trial has found them guilty”); *Hunt v. Roth*, 648 F.2d 1148, 1156 (8th Cir. 1981) (“The protection against excessive bail has a direct nexus to the presumption of innocence, implicitly recognized within the fourteenth amendment.”).

<sup>261</sup> THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 311 (Boston, Little, Brown & Co. 1868).

<sup>262</sup> *Stack*, 342 U.S. at 5 n.3 (emphasis added) (quoting FED. R. CRIM. P. 46(c) (1946) (amended 1972)); see also BAUGHMAN, *supra* note 5, at 740.

<sup>263</sup> BAUGHMAN, *supra* note 5, at 740.

<sup>264</sup> See, e.g., 18 U.S.C. § 3142(f) (2012) (mandating hearing to determine factors such as assuring reappearance in court and safety of others); FLA. STAT. ANN. § 907.041(4)(a) (West 2017) (listing “dangerous” crimes which affect bail determination); S.D. CODIFIED LAWS § 23A-43-2 (2018) (giving court discretion to deny bail if such release “will not reasonably assure” defendant’s appearance back in court or safety of another person or community); *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) (finding that bail may be used as preventative measure under 18 U.S.C. § 3142(f) if even single condition in statute is satisfied); *Watkins v. Lamberti*, 82 So.3d 825, 826 (Fla. Dist. Ct. App. 2011) (finding that lower court is authorized to refuse bail “after consideration of the factors set forth in Florida Rule of Criminal Procedure 3.131”); *State v. Olson*, 152 N.W.2d 176, 178 (S.D. 1967) (“The granting of bail to a large extent is governed by the facts and circumstances of each particular case.”).

<sup>265</sup> BAUGHMAN, *supra* note 5, at 740.

<sup>266</sup> *Id.* at 740-41.

procedure.<sup>267</sup> Judges were empowered to deny bail in noncapital cases.<sup>268</sup> Risk of flight was formally and generally the only factor considered when determining whether to grant bail, but the rationale that bail may also be used as a means of preventing the defendant from committing future crimes and ensuring “community safety” garnered acceptance in the legal world.<sup>269</sup> The concern that defendants were committing crimes pretrial manifested in the Bail Reform Act of 1984, enabling judges, for the first time—and very controversially at the time—to deny bail to protect the community.<sup>270</sup>

While some states preserved the right to bail for noncapital offenses in their constitutions, numerous other jurisdictions changed to mirror the federal use of bail.<sup>271</sup> The harms to defendants as a whole have been documented. There has been a dramatic decline in defendants being released pretrial.<sup>272</sup> Some of this has to do with the increasing reliance on money bail and defendants not being able to afford release. Another factor is the largely baseless fear of judges that releasing an individual charged with any crime will lead to violent crime.<sup>273</sup>

The specific impacts of defendants being denied bail before trial have been dramatic. And these impacts are particularly harmful for misdemeanor defendants. Felony defendants sometimes pose too great a risk of violent crime to be released, or too great a flight risk—though this is rare.<sup>274</sup> But misdemeanor defendants should be released almost always—unless there is an extraordinary exception. Historically this was the case, but there is not an explicit recognition today that release before trial should be a presumption in misdemeanor cases. Instead, today misdemeanor defendants are detained at similar levels as felony

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<sup>267</sup> *Id.* at 757.

<sup>268</sup> *Id.* at 762.

<sup>269</sup> *Id.* at 746.

<sup>270</sup> 18 U.S.C. § 3142(g)(4) (2012).

<sup>271</sup> *See, e.g., Ex parte Colbert*, 805 So.2d 687, 688 (Ala. 2001) (internal citations omitted) (stating that Alabama Constitution provides “absolute right to bail in all noncapital cases”).

<sup>272</sup> Prior to 1990, just under seventy percent of defendants were released pretrial; as of 2004, slightly more than fifty percent were released pretrial. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T JUST., BUREAU JUST. STAT., SPECIAL REPORT: STATE COURT PROCESSING STATISTICS, 1990-2004, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/6PBT-LBLA>].

<sup>273</sup> Some of this concern is warranted. Those charged with felony crimes do tend to get arrested for other crimes when released pretrial at higher rates than the average population (still around fifteen percent). *See Baradaran & McIntyre, supra* note 29, at 535. However, it is extremely rare for even felony defendants to be arrested after release pretrial for a violent crime.

<sup>274</sup> *See generally* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. (forthcoming 2018) (discussing how rare flight risk really is as compared to failure to appear); Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837 (describing flight risk versus failure to appear, showing that flight risk is not common, and concluding that detaining people for flight risk should not be norm).

defendants.<sup>275</sup> Both felony and misdemeanor defendants who are detained cannot obtain release because they cannot afford small amounts of money bail.<sup>276</sup> In some jurisdictions, the same amount of felony and misdemeanor defendants (around eighty-eight percent) cannot be released before trial because they cannot afford bail.<sup>277</sup>

This is a major change in criminal adjudication and the impacts of this change are felt dramatically across the United States. The next Part specifically

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<sup>275</sup> CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSIGNER, ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 9 (2013), <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes-3.pdf> [https://perma.cc/9ASG-ZF7E]. Data on 153,407 defendants booked into a jail in Kentucky between July 1, 2009, and June 30, 2010, revealed that 33.75% of felony defendants were detained pretrial and 22.08% of misdemeanor defendants were detained pretrial. *Id.*; see also COHEN & REAVES, *supra* note 272, at 1 (“Between 1990 and 2004, 62% of felony defendants in State courts in 75 of the largest counties were released prior to the disposition of their case.”).

<sup>276</sup> See NATALIE R. ORTIZ, NAT’L ASS’NS COUNTIES FOUND., COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 8 (2015), [http://www.naco.org/sites/default/files/documents/Final%20paper\\_County%20Jails%20at%20a%20Crossroads\\_8.10.15.pdf](http://www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf) [https://perma.cc/P5W4-TE33] (“In cases when the defendants cannot pay money bail, they remain in jail. For example, the U.S. Bureau of Justice Statistics reported that more than one-third of felony defendants in large counties were unable to meet their financial conditions for pretrial release and were thus held on bond in jail in 2009. Although there are no national level data on similar rates for misdemeanor cases, pretrial detention rates . . . in misdemeanor cases range from 22 percent on average in Kentucky counties to 48 percent in cases with bail amounts less than \$1,000 in New York City.”). However, another study found that defendants arrested for felonies are twenty-five percentage points less likely to be released than those arrested for misdemeanors, a forty-six percent decrease. WILL DOBBIE, JACOB GOLDIN & CRYSTAL YANG, NAT’L BUREAU ECON. RES., THE EFFECTS OF PRE-TRIAL DETENTION ON CONVICTION, FUTURE CRIME, AND EMPLOYMENT: EVIDENCE FROM RANDOMLY ASSIGNED JUDGES 17 (2016), [http://scholar.harvard.edu/files/cyang/files/dgy\\_bail\\_july2016.pdf](http://scholar.harvard.edu/files/cyang/files/dgy_bail_july2016.pdf) [https://perma.cc/7ZKV-NU2E].

<sup>277</sup> Compare COHEN & KYCKELHAHN, *supra* note 35, at 7 (felonies), with AM. BAR ASS’N, CRIMINAL JUSTICE SECTION, FREQUENTLY ASKED QUESTIONS ABOUT PRETRIAL RELEASE DECISION MAKING 3, <http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/faqpretrial.pdf> [https://perma.cc/UGS9-L5YB] (last visited Apr. 28, 2018) (misdemeanants in New York City). Money bail is required in about seventy percent of felony cases nationally. COHEN & REAVES, *supra* note 272, at 3. Of those felony defendants, fifty-three percent remain in jail, mostly because they cannot pay the money bail. See *id.* Of those felony defendants that remain in jail, eighty-eight percent remain detained throughout the pretrial period solely because they cannot afford their bails. See COHEN & KYCKELHAHN, *supra* note 35, at 7. And as the use of money bail increases, the release rates decrease. AM. BAR ASS’N, *supra*. This is also the case with misdemeanors, according to this study. *Id.* For example, eighty-seven percent of defendants in New York City charged with misdemeanors in 2008 who had money bail amounts of \$1000 or less were unable to post bail. *Id.* These defendants remained detained throughout the entire pretrial period. *Id.* Almost three-fourths of these misdemeanor defendants were charged with non-violent, non-weapons-related offenses. *Id.*

discusses the impact of misdemeanor charges on defendants as well as the consequences of denying bail.

### III. IMPACT OF MISDEMEANORS AND DETENTION

Even though a misdemeanor is a crime, usually with punishment less than a year, it is typically as consequential for a defendant's life as a felony. Misdemeanor defendants are detained before trial almost as often as felony defendants because they cannot afford bail.<sup>278</sup> Often, defendants will go to jail for a couple days or weeks and in that time, lose their jobs, apartments, and sometimes children and family stability. A defendant will also be disadvantaged in her criminal case if she is not released before trial. She will have less of an opportunity to prepare her case, meet with counsel, find witnesses in her defense, and research legal matters. And all of these consequences are for violations that are dismissed eighty percent of the time and ultimately result in no legal consequences.<sup>279</sup> Indeed, the impacts of misdemeanors are detrimental and often life-altering to defendants.

Misdemeanor charges do not receive the attention they deserve. Misdemeanors are considered minor offenses, and for that reason, they are largely disregarded despite frequent, and often wrongful, convictions. Offenders are routinely incarcerated for shorter periods of time if they plead guilty; this leads to innocent individuals pleading guilty to avoid jail time.<sup>280</sup> This means even though there may have been no evidence of the offense, individuals will plead guilty in order to go back home.<sup>281</sup> For this reason, Megan Stevenson notes that "detention can distort criminal adjudication" because pretrial detention may induce innocent defendants to plead guilty in order to be released.<sup>282</sup>

Misdemeanor defendants have always pleaded guilty to avoid trial. In medieval cases, defendants would "sometimes plead Not guilty but, 'in order to spare the outlay, labour, and expenses with respect to trying an issue by the

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<sup>278</sup> See *supra* note 275 and accompanying text.

<sup>279</sup> See Roberts, *supra* note 24, at 300 (stating high numbers of misdemeanors incentivizes all parties involved to plea bargain before case gets to trial); Mike Gallagher, *Violence Cases Rarely Go to Trial; 8 of 10 Domestic Assaults Dismissed*, ALBUQUERQUE J., May 1, 2005, at A1 ("About 2,900 misdemeanor domestic violence cases—those that don't involve great bodily harm—were disposed of in Metropolitan Court last year . . . [with] 2,278 dismissed by judges or prosecutors.").

<sup>280</sup> Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/misdemeanors\\_can\\_have\\_major\\_consequences\\_for\\_the\\_people\\_charged\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html) [https://perma.cc/DF43-JYZS].

<sup>281</sup> See BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 33 (mentioning attorney who laments bail being set so high so as to force them to give up on cases to get defendant out of jail).

<sup>282</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 714.

country in that behalf, [pray] to be admitted to a fine with the lord king.’”<sup>283</sup> The fate of disadvantaged defendants in misdemeanor proceedings is remarkably similar today to what it was historically. In today’s system, innocent misdemeanants routinely plead guilty to get out of jail because they cannot afford bail or because they do not want to risk trial.<sup>284</sup>

According to recent studies on misdemeanors, pretrial detention leads to more defendants pleading guilty, being convicted, and serving longer sentences.<sup>285</sup> One University of Chicago study shows that in misdemeanor cases, defendants are more likely to plead guilty if they are subject to pretrial detention, and the plea deals that they obtain are likely to be less favorable.<sup>286</sup> In focusing on two federal courts, New Jersey and East Pennsylvania, another recent study shows that pretrial detention and revocation of pretrial release are significant predictors of sentencing length.<sup>287</sup> According to the study, if defendants are subject to pretrial detention in federal court, they will receive an average of thirty-nine months longer on their sentences.<sup>288</sup> Defendants whose pretrial release is revoked will, on average, receive a sentence that is fourteen months longer.<sup>289</sup> And another study of New Jersey found that pretrial detention significantly and negatively affects the length of a defendant’s sentence.<sup>290</sup> The authors found that defendants who were detained prior to trial received longer sentences than defendants who were released on bail.<sup>291</sup> Finally, another study by Marion Williams suggests that judges are more lenient with individuals who are released prior to trial than those who are unable to afford bail.<sup>292</sup>

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<sup>283</sup> BAKER, *supra* note 69, at 522 (alteration in original).

<sup>284</sup> See Natapoff, *supra* note 49, at 1346-47.

<sup>285</sup> BAUGHMAN, *supra* note 5, at 83-84; see also Stevenson, *supra* note 32, at 26 (“[In Philadelphia] pretrial detention leads to a 13% increase in the likelihood of being convicted, mostly by increasing the likelihood that defendants, who otherwise would have been acquitted or had their charges dropped, plead guilty.”); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments 16* (Nov. 9, 2016) (unpublished manuscript) (on file with University of Chicago Division of the Social Sciences), [http://home.uchicago.edu/~npope/pretrial\\_paper.pdf](http://home.uchicago.edu/~npope/pretrial_paper.pdf) [<https://perma.cc/YK29-TQRF>].

<sup>286</sup> See Leslie & Pope, *supra* note 285, at 16; see also J.C. Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, 33 JUST. Q. 1103, 1115-17 (2016).

<sup>287</sup> Oleson et al., *supra* note 286, at 1114-15.

<sup>288</sup> *Id.* at 1115-16 (describing results of study that considered effect of pretrial detention on postconviction sentences in 1723 cases).

<sup>289</sup> *Id.* at 1114-15.

<sup>290</sup> Sacks & Ackerman, *supra* note 33, at 71 (reporting results of study focusing on factors influencing sentencing decisions).

<sup>291</sup> *Id.* at 62.

<sup>292</sup> See Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 313-14 (2003) (finding that pretrial detention was strongly correlated with incarceration and length of sentence for defendants who plead guilty).

Research has also demonstrated that misdemeanor detention not only harms a defendant's current case, but also leads to future rearrests and recidivism. A large study focused on the consequences of pretrial detention for misdemeanor offenders in the third largest county in the United States—Harris County, Texas.<sup>293</sup> This study examined more than three hundred fifty thousand individual misdemeanor cases.<sup>294</sup> Like the preceding studies on pretrial detention, this one found negative effects of detention on making a plea deal, the likelihood of conviction, the likelihood of a custodial sentence, and the length of sentence.<sup>295</sup> However, it also found that detention pretrial increased the likelihood of future rearrest for a new crime.<sup>296</sup> This study is significant because it demonstrated that even detention for minor crimes (like misdemeanors) can lead to recidivism and increased future arrests.<sup>297</sup> The Harris County study also found that poor defendants are more likely to be detained than wealthy defendants.<sup>298</sup> In short, misdemeanor defendants were worse off in every category after being detained—even after being detained for just a short time.

Resolving a misdemeanor charge is a lengthy ordeal. A recent study of American courts determined that the misdemeanor process is “informal, overcrowded, and sloppy.”<sup>299</sup> The court's increased workload delays the process for individuals charged with minor and major offenses.<sup>300</sup> This means that an offense that is punishable by three months at most will likely take more than three months to be resolved.<sup>301</sup> Not only are these delays burdensome to defendants, but the delays violate defendants' constitutional rights.<sup>302</sup>

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<sup>293</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 714, 718 (examining results of study that suggest revised pretrial release policies would yield beneficial results, such as increase in public safety, saved money, and reduction in wrongful convictions).

<sup>294</sup> *Id.* at 734.

<sup>295</sup> *Id.* at 717.

<sup>296</sup> *Id.* at 718 (finding that eighteen months after trial, defendants who were detained pretrial were thirty percent more likely to be charged with new felonies and twenty percent more likely to be charged with new misdemeanors).

<sup>297</sup> It may be assumed that felony defendants who are detained fare worse in their criminal cases, but the fact that misdemeanor defendants who are detained also face increased future arrests is troubling.

<sup>298</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 737 (noting that around thirty percent of defendants from wealthiest parts of county are detained pretrial, while around sixty to seventy percent of defendants from poorest areas are detained).

<sup>299</sup> Natapoff, *supra* note 280; *see also* BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 14; Natapoff, *supra* note 49, at 1315 (“Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel.”).

<sup>300</sup> William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html>.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

Prosecutors also request more time and delay hearings; however, defendants are not always given the same benefit when they need court dates changed.<sup>303</sup> Inevitable delays in misdemeanor cases usually end up harming defendants and increasing their jail stays.

Most misdemeanor defendants are not detained for any particular purpose. It is often because they cannot afford bail, and most of them are released at some point during the process—usually after they have suffered the severe consequences of being incarcerated. In a study conducted in New York City, the authors found that of the misdemeanor cases that were not disposed of at arraignment, seventy-nine percent were released with no conditions.<sup>304</sup> The other twenty-one percent of misdemeanor defendants faced the possibility of pretrial detention.<sup>305</sup> The authors found that only ten percent of misdemeanor defendants were detained throughout their entire cases.<sup>306</sup> Overall, this study demonstrates that the vast majority of misdemeanor cases are those where individuals can be released on recognizance without any conditions. And it logically follows that many more could be released without bail but with conditions.

Furthermore, many of the charged individuals will not even get lawyers as their cases are rushed through the system.<sup>307</sup> Not all jurisdictions require counsel to be present at initial hearings, and, unfortunately, indigent defendants often do not have their lawyers present when bail is set.<sup>308</sup> In so-called “no-lawyer-courts,” some defendants are denied counsel altogether even when they are constitutionally entitled to representation.<sup>309</sup> It is especially unlikely for misdemeanor defendants to have appointed counsel.<sup>310</sup> And even though it is

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<sup>303</sup> *Id.*

<sup>304</sup> MICHAEL REMPEL ET AL., CTR. FOR CT. INNOVATION, JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM vii (2017), [http://www.courtinnovation.org/sites/default/files/documents/NYC\\_Path\\_Analysis\\_Final%20Report.pdf](http://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf) [<https://perma.cc/5W6C-KKD8>] (presenting results of study designed to reduce jail population and discussing collateral consequences to incarcerated defendants).

<sup>305</sup> *Id.* Of the twenty-one percent, three percent posted bail at arraignment, twenty-five percent were detained on bail, and one percent were remanded without bail. Some individuals detained at arraignment later made bail.

<sup>306</sup> *Id.*

<sup>307</sup> BORUCHOWITZ, BRINK & DIMINO, *supra* note 26, at 18.

<sup>308</sup> BAUGHMAN, *supra* note 5, at 118-19.

<sup>309</sup> Thomas B. Harvey, Jared H. Rosenfeld & Shannon Tomascak, *Right to Counsel in Misdemeanor Prosecutions After Alabama v. Shelton: No-Lawyer-Courts and Their Consequences on the Poor and Communities of Color in St. Louis*, CRIM. JUST. POL’Y REV., 2017, at 3 (discussing how lower courts have been permitted too much leeway in determining when defendants are entitled to representation, leading to various cases where indigent defendants at risk of going to prison are not assigned counsel in violation of Constitution).

<sup>310</sup> *See id.* at 5 (noting that there is little guidance from Supreme Court on when right to counsel applies to misdemeanor defendants who could possibly face punishments ranging from prison time to fines).



such a consequential hearing, it is even more unlikely for misdemeanor defendants to have lawyers represent them for a bail hearing.

Indeed, as Alexandra Natapoff so aptly explains, misdemeanors should not be ignored, as “[t]he repercussions of a petty conviction can be anything but minor.”<sup>311</sup> Individuals convicted of misdemeanors face substantial long-term negative effects including an increased likelihood of a subsequent arrest and a longer sentence if convicted of any later offense.<sup>312</sup> Often, police, prosecutors, and courts are sympathetic to individuals without records, while those with criminal records are subject to more severe treatment.<sup>313</sup>

A defendant will also be disadvantaged in her case if she is not released before trial. A New York City study revealed that during a one-year period, eleven thousand misdemeanor defendants were detained pretrial because they could not afford bail set as low as \$100.<sup>314</sup> A pretrial detainee will have less of an opportunity to prepare her case, meet with counsel, find witnesses in her defense, and research legal matters. Pretrial detainees, even low risk detainees, are also more likely to be sentenced to prison or jail and more likely to receive longer prison and jail terms than similar defendants who were not detained pretrial.<sup>315</sup>

Not only does a short time in jail lead to disastrous consequences for a defendant’s future case, but even a short term jail stay can be devastating. Jails are overcrowded and chaotic, which leads to random violence and disease.<sup>316</sup> A short time in jail can expose an inmate to infectious diseases, including tuberculosis, sexually transmitted infections, staph infections, and hepatitis.<sup>317</sup> In jail, rape and assault are common occurrences.<sup>318</sup> In 2017, the Second Circuit found that sometimes pretrial detention conditions in jail can amount to

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<sup>311</sup> Natapoff, *supra* note 280.

<sup>312</sup> Natapoff, *supra* note 49, at 1316-17.

<sup>313</sup> *Id.* at 1325 (citing WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 181 (1965)).

<sup>314</sup> BAUGHMAN, *supra* note 5, at 46; *see also* PRETRIAL JUSTICE INST., MACARTHUR FOUND., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 3 (2012), <http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf> [https://perma.cc/QP3R-QSRE].

<sup>315</sup> BAUGHMAN, *supra* note 5, at 83-84 (citing LOWENKAMP, VANNOSTRAND & HOLSINGER, *supra* note 275, at 10-11).

<sup>316</sup> John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385, 399-400, 402 (2006) (reporting results of study of safety in American prisons).

<sup>317</sup> Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007); Gibbons & Katzenbach, *supra* note 316, at 402; Jonathan Abel, *Staph Sends Pinellas Jail Inmate into Coma*, TAMPA BAY TIMES (Feb. 27, 2008), [http://www.sptimes.com/2008/02/27/Northpinellas/Staph\\_infection\\_sends.shtml](http://www.sptimes.com/2008/02/27/Northpinellas/Staph_infection_sends.shtml) [https://perma.cc/G3WL-2MMU] (reporting that woman contracted staph infection and pneumonia within ten days in jail, putting her in coma).

<sup>318</sup> *See* Gibbons & Katzenbach, *supra* note 316, at 399; Natapoff, *supra* note 49, at 1322.

punishment and violate due process.<sup>319</sup> In this recent case, pretrial criminal defendants in Brooklyn were subjected to “degrading conditions” in jail, including overcrowded and dirty cells, spoiled food, and undrinkable water.<sup>320</sup> As a general matter, conditions in jails are much worse than prisons nationwide, again, providing worse punishments for misdemeanor defendants than felony defendants who often serve time in prison rather than jail.<sup>321</sup>

Misdemeanor detention does not stop at devastating consequences for the accused. Other collateral consequences of misdemeanor detention include “adverse effects on employment, earnings, housing, families, and communities where incarcerated populations are concentrated.”<sup>322</sup> While incarcerated, an individual is prevented from working, and this results in lost income or even losing one’s job.<sup>323</sup> These financial hardships can cause a defendant to lose her home or apartment.<sup>324</sup> Even a small misdemeanor crime can affect a defendant’s family, especially the children.<sup>325</sup> A recent misdemeanor study by Paul Heaton, Sandra Mayson and Megan Stevenson demonstrates that pretrial detention leads to immediate costs such as loss of liberty and loss of employment and housing.<sup>326</sup> Many state and federal regulations prevent misdemeanants from obtaining local, state, or federal employment in areas such as elder care or home health aid or care for people with disabilities.<sup>327</sup>

A simple petty misdemeanor conviction can affect employment opportunities for the rest of a defendant’s life because many employers do not even interview individuals convicted of any offense.<sup>328</sup> Many employers also refuse to hire

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<sup>319</sup> *Darnell v. Pineiro*, 849 F.3d 17, 29, 37 (2d Cir. 2017) (finding in § 1983 action that inmates can challenge unusually horrendous conditions in detention facility because pretrial detainees may not be punished at all under Due Process Clause); *see also* *Caiozzo v. Koreman*, 581 F.3d 63, 71 (2d Cir. 2009) (finding that, to establish due process violation, pretrial detainees must prove “that the government-employed defendant disregarded a risk of harm to the plaintiff of which the defendant was aware”).

<sup>320</sup> *Darnell*, 849 F.3d at 23-25.

<sup>321</sup> *See* Robert G. Lawson, *Turning Jails into Prisons—Collateral Damage from Kentucky’s “War on Crime,”* 95 KY. L.J. 1, 5 (2006).

<sup>322</sup> REMPLE ET AL., *supra* note 304, at 6 (discussing collateral consequences to incarcerated defendants in study designed to reduce jail population).

<sup>323</sup> BAUGHMAN, *supra* note 5, at 87.

<sup>324</sup> *Id.*

<sup>325</sup> *See id.* at 88.

<sup>326</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 781.

<sup>327</sup> Roberts, *supra* note 24, at 299-300 (discussing misconceptions surrounding misdemeanors and lasting consequences to misdemeanor convictions).

<sup>328</sup> DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 71 (2007) (demonstrating through study that “ex-offenders are one-half to one-third as likely as equally qualified nonoffenders to be considered by employers” for employment); Jada Graves, *How to Find a Job When You Have a Criminal Record*, US NEWS (Nov. 19, 2013), <https://money.usnews.com/money/careers/articles/2013/11/19/how-to-find->

potential employees with any mark on their criminal records, even if the offense is unrelated to the employment.<sup>329</sup> Further, a misdemeanor conviction can stand in the way of professional licensing.<sup>330</sup> Educational opportunities are also impacted by criminal records, and individuals convicted of a misdemeanor drug offense are ineligible for federal student loans.<sup>331</sup>

There are other collateral consequences to a defendant besides loss of employment. An NAACP Legal Defense Fund study attempting to document the social costs of incarceration for nonviolent offenses surveyed thirty women in Mississippi.<sup>332</sup> It found that “nearly half of the women lost a home or apartment, while twelve lost vehicles. More than half of the women had children living with them when they were arrested and had to move in with relatives. Eight women had elderly parents who were affected financially.”<sup>333</sup> These collateral consequences harm communities—particularly in poor areas—where many families are separated and many face unemployment due to incarceration. These effects are felt in the same way even if incarceration is short—for misdemeanor crimes.

Many of the defendants detained prior to trial are misdemeanor defendants.<sup>334</sup> Even in misdemeanor cases, bail is often expensive, and defendants are routinely unable to afford it.<sup>335</sup> In some cases, bail for misdemeanors can be set at the same amount as bail for a felony.<sup>336</sup> Uniform bail schedules set bail amounts in many jurisdictions. For example, in Orange County, California, the uniform bail schedule sets bail for an unspecified misdemeanor at \$500.<sup>337</sup> Under the same uniform bail schedule, bail for domestic violence is set at \$10,000 and bail for “annoying communications” is set at \$1000.<sup>338</sup> Bail for misdemeanors ranges broadly, but extends up to \$15,000 for contempt and for violation of a restraining

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a-job-when-you-have-a-criminal-record (discussing lack of federal laws preventing employers from asking about previous arrests and convictions).

<sup>329</sup> Roberts, *supra* note 24, at 299-300.

<sup>330</sup> Natapoff, *supra* note 49, at 1316, 1325.

<sup>331</sup> *Id.* at 1316, 1326.

<sup>332</sup> See Roberts, *supra* note 24, at 300.

<sup>333</sup> *Id.*

<sup>334</sup> See BAUGHMAN, *supra* note 5, at 163; Heaton, Mayson & Stevenson, *supra* note 23, at 715 (finding that misdemeanors account for more than three-fourths of caseload in some courts).

<sup>335</sup> Heaton, Mayson & Stevenson, *supra* note 23, at 715.

<sup>336</sup> Shaila Dewan, *When Bail Is out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), [www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html](http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html) (discussing bail set at \$250,000 in both disorderly conduct case and in murder case).

<sup>337</sup> SUPERIOR COURT OF CAL., CTY. OF ORANGE, UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR) 16 (2018), <https://www.occourts.org/directory/criminal/felonybailsched.pdf> [<https://perma.cc/SC9A-G6L6>].

<sup>338</sup> *Id.*

order.<sup>339</sup> This is money that most low- or middle-income people do not have. For example, in New York a mere fifteen percent of defendants can afford to post bail of \$500 or less.<sup>340</sup> Misdemeanor bail becomes a social-sorting mechanism that allows wealthy individuals charged with minor crimes to be released immediately without a problem, but accuses lower income individuals to lose their jobs and easily ruin their lives.

Additionally, defendants often cannot pay the fines that accompany their charges, and misdemeanor offenders typically spend one to two months incarcerated before their cases are resolved.<sup>341</sup> The process to resolve a misdemeanor conviction has become increasingly expensive, and if individuals are unable to pay, they are subject to fines, “bench warrants, additional penalties, and incarceration.”<sup>342</sup> Misdemeanor fines create a markedly different experience for rich and poor defendants, disadvantaging similarly situated poor defendants who are often incarcerated when they cannot pay a small fine.

A recent Montana case exemplifies the financial hardships faced by misdemeanor defendants.<sup>343</sup> In Montana, the motor vehicle division “automatically and indefinitely suspends the driver’s licenses of people who owe court-ordered fines, costs, and restitution even if they simply cannot afford [to] pay.”<sup>344</sup> Without driver’s licenses, many individuals are not able to commute to work and are further pushed into poverty.<sup>345</sup> A simple misdemeanor could mean loss of one’s driver’s license and loss of mobility. These are grave consequences for such minor infractions.

For many legal residents or undocumented defendants, a conviction can also mean impending deportation.<sup>346</sup> Saul, a British citizen, had been a legal permanent resident of the United States for nearly a decade and was looking

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<sup>339</sup> *Id.*

<sup>340</sup> Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

<sup>341</sup> See Natapoff, *supra* note 280.

<sup>342</sup> See Natapoff, *supra* note 49, at 1326.

<sup>343</sup> DiFrancesco v. Bullock (*Montana*), EQUAL JUST. UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/protecting-rights-drivers-poor/protecting-rights-drivers-poor-montana/> [<https://perma.cc/4FJJ-ZY4L>] (last visited Apr. 28, 2018) (stating that although Montana lacks public transportation system, if driver is not able to pay court debts, the driver’s license is suspended resulting in lack of transportation and possible loss of employment).

<sup>344</sup> Class Action Complaint at 2, DiFrancesco v. Bullock, No. 2:17-cv-00066 (D. Mont. Aug. 31, 2017), ECF No. 1 (claiming Montana license suspension policy violates Constitution).

<sup>345</sup> *Id.* at 3.

<sup>346</sup> See Natapoff, *supra* note 49, at 1316; Teresa Wiltz, *What Crimes Are Eligible for Deportation?*, STATELINE (Dec. 21, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/21/what-crimes-are-eligible-for-deportation> [<https://perma.cc/D3P8-RGDU>] (discussing how even though first-generation immigrants are less likely to commit crimes than U.S. citizens, conviction of misdemeanor, such as petty theft, can result in deportation).

forward to applying for his U.S. citizenship.<sup>347</sup> But, because of a misdemeanor check fraud offense committed when he was nineteen years old, he suddenly faced deportation under President Obama's immigration reforms.<sup>348</sup> It cost his family five years and \$55,000 to save him from this fate.<sup>349</sup> Few families can marshal the same resources as Saul's family did, yet thousands of legal residents fall into the tangle of immigration trouble because of small misdemeanors that qualify as "crimes of moral turpitude."<sup>350</sup>

Aufanua Manusina did not fare as well; he appeared with his family to apply for U.S. citizenship after fifteen years in the United States, but was deported for a misdemeanor bar fight that had occurred eleven years earlier.<sup>351</sup> Caught up in the same net as Saul, which President Obama had intended for "felons, not families,"<sup>352</sup> Mr. Manusina was deported.<sup>353</sup> His deportation was based on a minor assault for which an immigration judge declined to order his deportation in 2006.<sup>354</sup> Threats to legal status are one major consequence of misdemeanor convictions. Many misdemeanor convictions can lead to automatic deportability.<sup>355</sup>

Other miscellaneous consequences of misdemeanors include losing civil rights, ostracism, and losing public benefits. Even an individual's right to vote can be restricted by a petty conviction.<sup>356</sup> Social opportunities also diminish as a result; being labeled a criminal stigmatizes the individual "not only to employers, but also to friends, family, community, and themselves."<sup>357</sup> This stigma causes criminals to retreat "from mainstream institutions in anticipation

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<sup>347</sup> Edward Delman, *My Brother Was Almost Deported*, ATLANTIC (Dec. 19, 2014), <https://www.theatlantic.com/national/archive/2014/12/immigration-obama-deportation-misdemeanor-felony/383920/> [<https://perma.cc/9UKB-4YEA>] (commenting on U.S. system where one misdemeanor is sufficient to trigger deportation).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> Dora Scheidell, *Utah Family Speaks After Father Deported to Samoa Due to Misdemeanor from 2006*, FOX 13 (Aug. 2, 2017, 9:28 PM), <http://fox13now.com/2017/08/02/utah-family-speaks-after-father-deported-to-samoa-due-to-misdemeanor-from-2006/> [<https://perma.cc/75WW-WFND>].

<sup>352</sup> See Delman, *supra* note 347.

<sup>353</sup> Scheidell, *supra* note 351.

<sup>354</sup> *Id.*

<sup>355</sup> See Roberts, *supra* note 24, at 298.

<sup>356</sup> See Natapoff, *supra* note 49, at 1325 (citing ALEC EWALD, SENTENCING PROJECT, A 'CRAZY-QUILT' OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 3-10 (Nov. 2005)).

<sup>357</sup> See *id.* at 1327; see also Lawrence v. Texas, 539 U.S. 558, 560 (2003) (recognizing potential stigma resulting from misdemeanor offense); W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 136-51 (2011) (defining "stigma" and discussing stigma as due process liberty interest).

of hostile reactions.”<sup>358</sup> A criminal record can affect child custody, as well as eligibility for health care programs.<sup>359</sup> Individuals who are convicted of misdemeanors may be restricted from food stamps and public housing and will also have a difficult time renting apartments.<sup>360</sup> These consequences can be even more dramatic if the individual ends up on a sex offender registry.<sup>361</sup>

As demonstrated in this Part, the impacts of a misdemeanor are life altering. Defendants locked up for just a short time are more likely to plead guilty, obtain convictions, serve longer sentences, and, even when released after a couple days, are more likely to recidivate. The conditions they face in jail are often deplorable, as modern day jails are filled with rampant assault, overcrowding, rapid disease spread, and sometimes rotten food and water. Upon release, many misdemeanor defendants face the possibility of having lost their jobs, their homes, and stable family conditions. The overwhelming majority of individuals pose no harm to society and are simply detained because they do not have a few hundred dollars to pay bail. The consequences of misdemeanor detention are much harsher for minority and poor defendants, who are often offered higher bail amounts for similar crimes. Those defendants who cannot afford to pay small amounts of bail face detention as a result.

#### CONCLUSION

There is one integral right that has historically accompanied misdemeanors: bail. Under the common law, after being charged with a misdemeanor, bail was a guaranteed right. In fact, sheriffs and courts that denied defendants the right to release before trial were subject to punishment under the law. Misdemeanors have historically been less serious crimes, and now—with the proliferation of felonies—are even less severe than they once were. Where in the Middle Ages,

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<sup>358</sup> See Natapoff, *supra* note 49, at 1327; see also Ball, *supra* note 357, at 148 (declaring that stigmatized individual “cannot participate meaningfully in society”).

<sup>359</sup> See Natapoff, *supra* note 49, at 1325 (citing *What You Don’t Know Can Hurt You*, TEX. FAIR DEF. PROJECT, <http://www.fairdefense.org/resource/what-you-dont-know-can-hurt-you/> [<https://perma.cc/R6XB-XK84>] (last visited Apr. 28, 2018) (describing consequences of misdemeanor conviction)); see also 42 U.S.C. § 1320a-7(b)(3) (2012) (announcing ineligibility for Medicare if individual is convicted of misdemeanor related to controlled substances).

<sup>360</sup> See Natapoff, *supra* note 49, at 1325-26 (discussing how consequences of misdemeanors are numerous, despite pettiness of crime); *No Second Chance: People with Criminal Records Denied Access to Public Housing*, HUM. RTS. WATCH (Nov. 17, 2004), <https://www.hrw.org/report/2004/11/17/no-second-chance/people-criminal-records-denied-access-public-housing#page> [<https://perma.cc/H8KG-X2W3>] (recounting experiences of individuals denied public housing due to shoplifting or not paying for video rentals).

<sup>361</sup> See Natapoff, *supra* note 49, at 1326; see also Kohler-Hausmann, *supra* note 24, at 630 (featuring table that lists sex offenses as one of most common types of misdemeanors in past thirty years). See generally Ball, *supra* note 357 (analyzing stigma of sex offender registration and negative consequences).

misdemeanors ranged from battery to maiming and kidnapping, they are now even less serious crimes which range from petty theft to speeding and vandalism. But even though misdemeanors are less serious crimes than they once were, the rights guaranteed to misdemeanor defendants have diminished substantially. Those charged with minor nonviolent crimes are not guaranteed release before trial like they once were.

In today's legal landscape, the process has become the punishment. Indeed, the immediate and lifelong consequences of being charged with a misdemeanor can be devastating. If a defendant is charged with a misdemeanor and cannot afford bail, a short detention results. And usually charges are dismissed soon thereafter. Judges and others in the system may not see this as a serious consequence, but as demonstrated in this Article, this sort of detention can be devastating. As demonstrated above, even a few days in jail for a misdemeanor often leads to an individual losing a job and future employment options, which, in turn, leads to further incarceration and increases recidivism. Misdemeanor detention also discriminates against the poor and minorities, especially against African Americans, who often have less options to pay for release.

Even so, misdemeanors are largely ignored by the judicial system and even by the legal academy. With such grave consequences, misdemeanor crimes should be afforded more attention by the legal world. At a minimum, misdemeanors should be separated from felony offenses when it comes to bail decisions. Misdemeanors by their nature are less serious crimes, and except for in rare circumstances, should allow release on bail. In addition, the proliferation in the number of misdemeanors in states and federal jurisdictions demonstrates an overcriminalization that should be carefully considered. While it is unclear whether the number of new misdemeanors or the current number of misdemeanor arrests are justified, what is clear is that the impact these misdemeanor arrests and detentions are having is staggering. And for that reason, these "less serious" crimes are now largely as serious as felonies in impact.

This Article contributes to other important empirical work on misdemeanor detention<sup>362</sup> and the realization of the broader impact misdemeanors have on the criminal justice system.<sup>363</sup> It has provided some historical context for misdemeanor detention and theoretical backing for the importance of treating these crimes as less serious in nature and maintaining the guarantee of release. Historically, there is no dispute that misdemeanor defendants were guaranteed bail based on due process rights. And because these principles still guide criminal justice today, it should not be controversial to guarantee bail for almost

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<sup>362</sup> See Heaton, Mayson & Stevenson, *supra* note 23 (discussing how pretrial detention of misdemeanor defendants can induce innocent defendants to plead guilty in order to leave jail, in addition to other negative effects).

<sup>363</sup> See generally Natapoff, *supra* note 49; Roberts, *supra* note 24; Stevenson & Mayson, *supra* note 31.

all misdemeanor offenses. Indeed, the baseline right for all misdemeanor defendants is bail.

What is left to consider, however, constitutes the next step in this study of misdemeanor bail. In further consideration beyond the historical comparison offered here, it is important to study how states are individually handling misdemeanor crimes and whether these historic rights uncovered in this Article are being respected. We know based on the numbers nationally that many defendants are being detained for misdemeanor crimes. But what we do not know includes some of the following: Is there a cohesive national standard by which to judge misdemeanor bail? Are current state and local standards for judging misdemeanor bail similar to, or less strict than, those of felony bail? While this Article starts the conversation of how misdemeanor bail rights should be analyzed, it is important, as a next step, to discuss whether there are governing rules on misdemeanor bail and how those rules are distinguished from rules governing bail for felony offenses. The final step would require reconciling these modern statutes and case law with the history and governing rights for misdemeanors. These important questions and analysis are left for another day.

In the meantime, the focus should be on reducing misdemeanor detention. Even without further study, the fact that misdemeanor defendants are detained as often nationally as felony defendants deserves attention. The fact that defendants charged with misdemeanors are overwhelmingly detained (over eighty percent of the time) is problematic. And the fact that most misdemeanor defendants are detained just because they cannot pay bail, and their cases are not even pursued legally (also over eighty percent) is a massive setback. The historic context provided in this Article helps put into context these modern wrongs. Misdemeanors historically were always less serious crimes, but they did not ruin a defendant's life as they do today.